NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

CIS Congressional Information Service, Inc
Washington, D.C.

S. HRG. 99-787

FAIR HOUSING INITIATIVES PROGRAM

HEARING

BEFORE THE

SUBCOMMITTEE ON
HOUSING AND URBAN AFFAIRS

OF THE

COMMITTEE ON
BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

PROPOSED GUIDELINES FOR FAIR HOUSING TESTING INCLUDED IN SECTION 602 OF S. 2507

JUNE 18, 1986

Printed for the use of the Committee on Banking, Housing, and Urban Affairs

U.S. GOVERNMENT PRINTING OFFICE

62-308 O WASHINGTON : 1986

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S241-38

SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

JAKE GARN, Utah, *Chairman*

JOHN HEINZ, Pennsylvania
WILLIAM L. ARMSTRONG, Colorado
ALFONSE M. D'AMATO, New York
SLADE GORTON, Washington
MACK MATTINGLY, Georgia
CHIC HECHT, Nevada
PHIL GRAMM, Texas

WILLIAM PROXMIRE, Wisconsin
ALAN CRANSTON, California
DONALD W. RIEGLE, JR., Michigan
PAUL S. SARBANES, Maryland
CHRISTOPHER J. DODD, Connecticut
ALAN J. DIXON, Illinois
JIM SASSER, Tennessee

M. DANNY WALL, *Staff Director*
KENNETH A. MCLEAN, *Minority Staff Director*
LINDA ZEMKE, *Counsel*

SUBCOMMITTEE ON HOUSING AND URBAN AFFAIRS

CHIC HECHT, Nevada, *Chairman*

JAKE GARN, Utah
JOHN HEINZ, Pennsylvania
WILLIAM L. ARMSTRONG, Colorado
ALFONSE M. D'AMATO, New York
SLADE GORTON, Washington
MACK MATTINGLY, Georgia
PHIL GRAMM, Texas

DONALD W. RIEGLE, JR., Michigan
PAUL S. SARBANES, Maryland
WILLIAM PROXMIRE, Wisconsin
ALAN CRANSTON, California
CHRISTOPHER J. DODD, Connecticut
ALAN J. DIXON, Illinois
JIM SASSER, Tennessee

PHILIP A. SAMPSON, *Staff Director*
GERRY WYRSCH, *Assistant to the Chairman*
W. DONALD CAMPBELL, *Minority Staff Director*

CONTENTS

WEDNESDAY, JUNE 18, 1986

	Page
Opening statement of Senator Hecht	1
Opening statements of:	
Senator D'Amato	2
Senator Dixon	11
Senator Proxmire	27
Senator Heinz	69

WITNESSES

John Knapp, general counsel, Department of Housing and Urban Development	2
Direct funding of private fair housing groups for private enforcement activities	2
Cooperation of NAR on testing procedures	3
Prepared statement	6
Witness discussion:	
Objective of the guideline language	11
Avery Friedman, attorney at law	13
Possible misconstruing of FHIP guidelines	13
Post-testimony submission	15
Galen Martin, executive director, Kentucky Commission on Human Rights	17
Kentucky's progress on housing discrimination	17
Comprehensive testing gets results	18
Prepared statement	20
Panel discussion:	
New regulations would cut off a primary enforcement method	28
Maintain direct access to Federal courts	29
HUD should be on the side of enforcement	30
Althea Simmons, director, Washington bureau of the National Association for the Advancement of Colored People	31
NAACP supports the program	31
Grave reservations on guidelines	32
Prepared statement	34
William Tisdale, executive director, Metropolitan Milwaukee Fair Housing Council	37
Clear retreat of valid testing	37
Courts have already determined discrimination	39
Prepared statement	40
Kent Willis, executive director, Housing Opportunities Made Equal	42
Issue of allegation of discrimination before a test	43
Lee Porter, director, Fair Housing Council, Bergen County, NJ	43
Prepared statement	45
Panel discussion:	
Unfair, invalid, and not objective	48
Courts have shaped and refined testing	50
Training of testers	51
William D. North, executive vice president, National Association of Realtors	52
Certain misunderstandings	52
Tester assignment and control program	53
Prepared statement	55
The guidelines	55
Conclusion	58

Page

Witness discussion:
Imperative that testers be neutral 59
Sweep testing 60
Tests permitted through a pattern of discrimination 64
Guidelines are not a deterrent to testing 70
Tried on a limited basis 71
Antagonistic atmosphere 72

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

"Nation's Policy on Integration at Crossroads," article by Ann Marino, from the Washington Post 73
"Critics Say U.S.-Realtors Deal Guts Anti-Discrimination Effort," article by Ann Marino, from the Washington Post 74

FAIR HOUSING INITIATIVES PROGRAM

WEDNESDAY, JUNE 18, 1986

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
SUBCOMMITTEE ON HOUSING AND URBAN AFFAIRS,
Washington, DC.

The subcommittee met at 9 a.m., in room SD-538, Dirksen Senate Office Building, Senator Chic Hecht (chairman of the subcommittee) presiding.

Present: Senators Hecht, Heinz, D'Amato, Gorton, Proxmire, and Dixon.

OPENING STATEMENT OF SENATOR HECHT

Senator HECHT. Good morning, everyone. The Subcommittee on Housing and Urban Affairs will have a hearing this morning on the Fair Housing Initiatives Program.

Today's hearing before the subcommittee was called at the request of Senator Proxmire, the distinguished ranking minority member of the full committee, at the markup of S. 2507, the Senate's Housing Act of 1986, which was held on May 21.

The reason for today's hearing is to allow a discussion of the Fair Housing Initiatives Program. This program has been an administration proposal for some time now and the administration deserves credit in their dedication to this issue.

The Fair Housing Initiatives Program in a form agreed upon by the Department of Housing and Urban Development and the National Association of Realtors is included as title VI of S. 2507.

While HUD and the realtors have reached agreement on this issue, some groups interested in fair housing have stated that they were unable to offer input to the discussion between HUD and the realtors.

Today's hearing is to give all parties a forum in which they can express their views.

I see I am now accompanied by the very distinguished Senator from New York, Senator D'Amato. Do you have an opening statement?

Senator D'AMATO. Mr. Chairman, I'm going to submit my statement for the record, with your approval, as if read in its entirety so we can get to the business of the hearing.

I commend you for holding this hearing on the Fair Housing Initiatives Program and also for giving the various groups, not only HUD but the National Association of Realtors, the NAACP, and the various housing councils and other organizations, the opportunity to provide testimony on this most important topic.

Obviously, to make available housing without prejudice, and without bias as to a person's race, color, or creed, is one of the tenets of this Nation. Thus, I think it's important that we address this issue and I commend you for holding this hearing, Mr. Chairman.

[The complete prepared statement follows:]

STATEMENT BY SENATOR ALFONSE D'AMATO

Senator D'AMATO. Mr. Chairman, I am pleased to join you for this hearing on the Fair Housing Initiatives Program [FHIP] included in the Housing Act of 1986 (S. 2507).

It is helpful to have representatives at this hearing from HUD, the National Association of Realtors, the NAACP, Fair Housing Councils, and other organizations to provide testimony on this very important topic. The promise of decent shelter has been an enduring dream for all Americans, but unfortunately the reality is sometimes otherwise. Therefore, the effort by all participants at this hearing to address this concern should be commended.

We must make certain that we prohibit housing discrimination on the basis of race, color, religion, sex, or national origin. Housing discrimination must not, and will not, be tolerated.

Therefore, Mr. Chairman, I am pleased that you are holding this hearing to address the Fair Housing Initiatives Program. We must continue our commitment to making certain that housing discrimination is not only discouraged, but eliminated.

Thank you, Mr. Chairman.

Senator HECHT. Thank you very much.

Let us begin with our first witness, John Knapp, general counsel, HUD. I am going to ask everyone to try and keep their remarks to 5 minutes. We will not shut you off at 5 minutes but at that particular time we will ask you then to summarize what you want to point out. Mr. Knapp.

STATEMENT OF JOHN KNAPP, GENERAL COUNSEL, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Mr. KNAPP. Thank you, Mr. Chairman.

I will, at your suggestion, read only parts of the written statement that I have submitted to the committee.

Our statement reviews the background of the administration's fair housing initiatives proposal and why the administration proposed it and attaches great importance to it, particularly to the private enforcement initiative.

DIRECT FUNDING OF PRIVATE FAIR HOUSING GROUPS FOR PRIVATE ENFORCEMENT ACTIVITIES

That portion of the proposal calls for direct funding of private fair housing groups for private enforcement activities utilizing the several procedures provided by current law but particularly the private right of action.

The proposal is an unusual, even unprecedented step. The Federal Government has not previously offered direct funding for private civil rights enforcement activities in any permanent ongoing way such as would be proposed here.

It is a step that flows from two convictions. One, about the essential role under the Fair Housing Act of private enforcement; and second, that private fair housing organizations are indispensible to that enforcement effort. Their role has been recognized and enhanced specifically by the Supreme Court in the *Havens* decision.

More important, as a practical matter, they are essential as a source of the kind of evidence that is virtually indispensible in a Fair Housing Act case.

The garden variety act of housing discrimination usually involves disparate treatment. A seeker of a sale or rental unit is treated differently from another for no reason other than race. That kind of differential treatment generally can be proved only by testing. There must be some kind of institutional arrangement that individual victims in the local market area can turn to in order to be able to obtain that kind of evidence through professionally trained testers.

There is no alternative source for that particular kind of indispensible support of discrimination complaints by individual victims other than the private fair housing groups, and as long as that remains the fact fair housing enforcement will not get very far without them.

That is what led us to introduce the fair housing initiatives proposal over a year ago and to commit so much support to it as we have done over the last year.

The proposal attracted support. It also attracted opposition, the main source of that opposition being the leadership of the 700,000 member National Association of Realtors [NAR].

That opposition has been a source of concern to us. It is a concern not limited to the question of whether it would prevent enactment of the program.

We were also concerned that even if enacted over that kind of an opposition, that kind of deeply felt opposition, given the nature of the opposition, that the implementation of the program, the success of the program would be in some danger. It would be operating under a handicap.

With that in mind, the Secretary decided to take a chance and take a risk of trying to reach a defensible understanding with the National Association of Realtors that would serve to alleviate the fears we believed unfounded but nevertheless obviously held by so many of that organization's members.

COOPERATION OF NAR ON TESTING PROCEDURES

For their part, Mr. Clark Wallace, the president of the realtors, and his colleagues showed a clear desire, in our view, to achieve a significant break from that organization's apparent history of intransigent opposition to legislative proposals in the fair housing area and to federally funded testing programs in particular.

The Secretary met directly with Mr. Wallace and there were a series of negotiations thereafter resulting in a set of written guidelines intended to govern testing funded under the private enforcement initiative of the Fair Housing Initiatives Program, and only testing funded under that section of this program.

The details of the understanding, which are incorporated in section 602 of the committee bill, are, I believe, fully supportable. Their requirements as to recruitment and training of testers, documentation of test results, matching of tester profiles, draws upon widely accepted standards reflected, among other places, in the "Guide to Fair Housing Law and Enforcement" prepared by the

National Committee Against Discrimination in Housing and published by them and by HUD in 1979, and in the proceedings of the 2-day HUD-sponsored Conference on Fair Housing Testing held in December 1984.

It is true that they exclude from eligibility for funding under the private enforcement initiative certain types of tests that are wholly legitimate enforcement devices and that have been recognized as such by courts and by administrative agencies.

This limitation flows particularly from the requirement that there be at least two paired testers as part of every test. This means, for example, that if a homeseeker lodges a complaint of discrimination with a fair housing organization it will not be sufficient if the testing is to be funded from this source to send one tester matched with the complainant and to stop there. Some fair housing organizations do bring enforcement actions based on a report by a single tester and such evidence has been accepted as probative and sufficient by courts and by administrative agencies.

At the same time, we know that virtually all fair housing organizations conduct paired tests at least some of the time and some have told us that they perform paired tests all of the time. So even if the unpaired test is excluded from funding eligibility under the private enforcement initiative, it seems clear that there remains a broad range of useful and necessary testing activities that can be funded from that source, which after all is also a limited source of resources.

We concluded that the exclusion of some legitimate activities seemed a small price to pay if we could succeed in allaying the destructive level of opposition and resentment that I referred to earlier.

Senator HECHT. Your 5 minutes are up but you can continue. Just summarize it.

Mr. KNAPP. Yes. I have also heard an expressed concern that courts may apply these guidelines to determine the credibility and the probativeness of tests other than those funded under the private enforcement initiative. I think that there is no basis for any such concern. For that matter, I do not believe that compliance with the guidelines should be considered by a court as a standard for admissibility or probativeness of the evidence even where a test is funded under the private enforcement initiative. There will be separate sanctions for noncompliance with the guidelines by program participants as provided in section 602(f) of the committee bill, but that should have nothing to do with the court's consideration of evidence.

By their terms as stated in the statutory language, the guidelines apply only to tests funded under the private enforcement initiative of the Fair Housing Initiatives Program. They do not even apply to testing by private organizations that is funded through the administrative enforcement initiative pursuant to contracts between State or local agencies and private groups. That omission is not a clever, quiet loophole. It is deliberate and acknowledged. The limited application of the guidelines will be stressed in the Department's regulations incorporating them as I would hope it would also be in committee and floor discussions of them.

Mr. Chairman, on behalf of the Department, I applaud the committee for its action in including the Fair Housing Initiatives Program in the bill reported by the committee. If enacted, we believe that the program will be a significant source of support for expanded effective fair housing enforcement, and with that I would open myself to questions from the committee.

[The complete prepared statement follows:]

Statement of John J. Knapp
General Counsel
U.S. Department of Housing and
Urban Development

on the
FAIR HOUSING INITIATIVES PROGRAM

before the

SUBCOMMITTEE ON HOUSING AND URBAN AFFAIRS
UNITED STATES SENATE

June 18, 1986

Mr. Chairman:

I thank you for your invitation to testify on the agreement between the Department and the National Association of Realtors regarding the Administration's proposal for a Fair Housing Initiatives Program. The agreement is reflected in Section 602 of the FY 1987 housing authorization bill, S. 2507, which was reported by the full Banking Committee on May 21.

As background, I will describe briefly the Fair Housing Initiatives proposal and why the Administration attaches great importance to it, particularly to its Private Enforcement Initiative component. I will then turn to the Guidelines for the funding of testing under the Private Enforcement Initiative that resulted from the Department's discussions with the National Association of Realtors.

Briefly, the Fair Housing Initiatives Program would authorize the Secretary to provide grants to State and local government agencies and to public or private organizations formulating or carrying out programs to prevent or eliminate discriminatory housing practices. The grants would enable the recipients to carry out activities designed to obtain enforcement of the rights granted by the Federal Fair Housing Act or by substantially equivalent State or local laws, or education and outreach programs designed to inform the public concerning rights and obligations under such Federal, State or local laws prohibiting housing discrimination.

The program was first proposed in the President's Budget for Fiscal Year 1986. Authorization language was included in the Department's proposed authorization bill, introduced in the Senate in March 1985 as S. 667. The program was proposed again by the President in his FY 1987 budget.

Insofar as it would authorize grants to State or local agencies that administer substantially equivalent State or local housing discrimination laws, the program would substantially duplicate and replace existing authority under which we now provide grants to such agencies under the competitive portion of the Fair Housing Assistance Program. Grants to State or local agencies for enforcement activities would constitute what we call the Administrative Enforcement Initiative. The FY 1987 Budget requests $3 million for this component. The Education and Outreach Initiative represents a substantial expansion of existing authorization. Some of the competitive grants under the Fair Housing Assistance Program to State or local agencies are now utilized for those purposes, and a portion of the grants now provided to Community Housing Resource Boards are also utilized for such purposes. The new proposal would expand the eligible recipients of grants for education and outreach purposes to include fair housing groups and other private civil rights organizations. The FY 1987 Budget requests $1 million for this component.

It is the authorization of direct grants to private non-profit organizations or other private entities for enforcement-related activities that represents something new and is the principal focus and motivation of our Fair Housing Initiatives proposal. This is the Private Enforcement Initiative, for which the FY 1987 Budget requests $3 million. The authorization is not limited to testing activities, but it is assumed that the bulk of funds made available under the Private Enforcement Initiative would be utilized for testing.

Private enforcement is vitally important to the Fair Housing Act. The statute provides for limited forms of governmental enforcement but it relies much more on private party pursuit of private complaints. This is not unique to the Fair Housing Act; the private right of action historically has been a major enforcement vehicle for our antitrust laws, civil rights laws, and others. The practical imperatives that make this especially applicable to the Fair Housing Act have been recognized explicitly by the Supreme Court, which said in its 1972 Trafficante opinion:

> "Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which. . .the complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority."1/

1/ Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211 (1972).

Senator HECHT. Thank you very much.

Senator Dixon has just put his statement into the record. The others who have submitted testimony can be assured that they will be placed into the hearing record.

[Senator Dixon's prepared statement follows:]

STATEMENT OF SENATOR ALAN J. DIXON

Senator DIXON. Mr. Chairman, I commend you for having called this oversight hearing on the Fair Housing Initiatives Program [FHIP]. Additionally, I commend Senator Proxmire for having requested this hearing during the time that the full committee was considering the 1986 housing reauthorization committee print on May 21, 1986.

I received a joint letter dated May 13, 1986 from Secretary Pierce and the president of the National Association of Realtors [NAR], Clark Wallace, stating that HUD and NAR "* * * have succeeded in drafting a set of guidelines.* * *" which would ensure that only objective, reliable, and controlled testing will be funded by HUD. I understand that many groups that are currently involved in conducting fair housing testing and some others are concerned about the fair housing provisions of S. 2507, the reauthorization bill, and question whether the guidelines should be included in the statute.

Mr. Chairman, I look forward to hearing the testimony from the witnesses today and feel certain that this subcommittee will be more adequately prepared to address FHIP prior to final action on the housing bill.

Senator HECHT. Senator Gorton, do you have opening statement?

Senator GORTON. I don't have an opening statement, Mr. Chairman, other than to say that it is important that we have this hearing and to give all sides of a rather complex challenge an opportunity to be heard in order to assure either that we have done the right thing in the bill which we reported or that perhaps some changes are appropriate.

Senator HECHT. Thank you.

Mr. Knapp, what is HUD's official position on including the fair housing guidelines in statutory language?

Mr. KNAPP. For our part, we did not enter into the discussions with the realtors with a view toward arriving at language to be incorporated in the statute. We entered into it in order to arrive at an understanding that we would incorporate in the regulations governing the program and we thought, from our perspective, that that would be sufficient.

OBJECTIVE OF THE GUIDELINE LANGUAGE

Now our reasons for not contemplating it being in the statute had nothing to do with the substance of the understanding. We have no regrets or concerns about the substance of the understanding or the language of the understandings that we reached. Our reasons for not including it in the statute would be the typical executive branch reluctance to have overly technical details in statutory language that could then impede one's subsequent response to experience. That is the kind of objection that the executive frequently expresses to legislative language and I might say the kind of objection that the legislature frequently brushes aside.

We have no objection to the guidelines being incorporated verbatim in the statute. As I said, we are committed to the substance of the agreement. We would incorporate them in our regulations if they were in the statute or if they were not.

It seems to me that the sole basis of concern about them being in the statute is the concern that I referred to that they would be applied more broadly than intended, that they could be applied by courts as defining guidelines to be applied to testing other than that funded under this program. But as I said in my statement, I think there is no basis for that concern. Certainly our regulations—in publishing our regulations we would make it clear that we had no such intention that they be that broadly applied, that they are simply governing testing funded under this limited program as a means of prioritizing the scarce resources as much as anything else, and I think that committee reports, conference reports, floor statements, could state the same thing forcefully and adequately to prevent that kind of a result.

Senator HECHT. We understand that only representatives of HUD and the National Association of Realtors were present in the negotiations over the FHIP guidelines.

Did HUD consider any outside sources and, if so, do you feel that those sources were representative of the groups affected by the guidelines?

Mr. KNAPP. We did not consult outside sources until we were finished, at the meeting on May 9 when we had, I believe, representatives of seven or nine—I can't remember which—fair housing groups. I do believe that those were representative of those who would be affected by the guidelines, the persons who were invited to that meeting.

We did not consider including those groups within the negotiations from the outset and I believe that that was essentially a tactical judgment as to whether the process would have any likelihood of success under those conditions.

We frankly had little enough optimism that we would be able to reach an acceptable agreement with NAR by ourselves. We did not think that that ability would be enhanced by having the private groups within the same negotiations as well.

We anticipated that there could be some resentment at the end due to their exclusion from the negotiations from the beginning. We thought that that risk was worth taking in view of our judgment as to the likely outcome of doing it in a different way.

Senator HECHT. Thank you.

Senator Gorton, do you have any questions?

Senator GORTON. No questions.

Senator HECHT. Thank you very much, Mr. Knapp.

At the request of Senator Proxmire who is now on the floor, I am going to ask the third panel to appear because he has questions for the second panel and has requested that we do it this way. I invite you, Mr. Knapp, to make additional comments in writing, if you so desire. Thank you for appearing.

The third panel is Avery Friedman and Galen Martin. If you two were not here before, I'm going to ask both of you to try and hold your remarks to 5 minutes. I won't cut you off but I will tell you when 5 minutes are up, and you can summarize whatever you want to say.

Mr. Avery Friedman.

STATEMENT OF AVERY FRIEDMAN, ATTORNEY AT LAW

Mr. FRIEDMAN. Mr. Chairman, members of the panel, I am Avery Friedman. I am a fair housing lawyer.

By way of brief background, our office has litigated in excess of 500 Federal fair housing cases which is approximately 100 more cases than the U.S Department of Justice, since the enactment of the Fair Housing Act.

That experience has taught us a great deal in terms of the struggle and difficulty in achieving equal housing opportunity.

POSSIBLE MISCONSTRUING OF FHIP GUIDELINES

In 1972, the U.S. Supreme Court in its first interpretation of the Fair Housing Act talked about the role of the Federal Government as being "minimal." Specifically, our concerns concerning the FHIP guidelines are that they may be misconstrued by the Federal courts throughout the Nation in terms of guidelines in evaluation of evidence establishing violations of title VIII of the 1968 Civil Rights Act.

Specifically, there have been important court decisions which have established objective criteria in evaluating violations of the Fair Housing Act. We would draw the court's attention, if I may for a moment—or the panel's attention—I'm sorry—to an opinion recently published comprised of 80 pages in evaluating testing evidence, and that is the *Heights Community Congress* v. *Hilltop Realty, Inc.* which can be found at 629 F. Supp 1232. This is the most comprehensive analysis of testing evidence to date and typical of how Federal courts throughout the Nation carefully evaluate tester evidence in housing discrimination cases.

The regulations themselves place serious restrictions in evaluation of evidence and also restrict the role of fair housing councils, many of which are present here, and of testers themselves. So to that extent, we are concerned.

By way of an example, yesterday we left the Commonwealth of Pennsylvania, having completed a Federal fair housing trial before an all-white jury in the U.S. district court in Harrisburg. That Federal jury returned a verdict against a discriminating landlord and the landlord must pay $25,000 to the victims. This judgment was based in part on evidence provided by the State's human relations commission which sent out only one tester.

It has been the experience in the Nation that American citizens are well able, those who serve on juries, to evaluate the credibility of other Americans who testify in Federal court in fair housing cases. To restrict the quality of evidence in housing bids cases is simply inappropriate, unnecessary and counterproductive to the objectives of existing law.

The other particular concern we have is that in 1974, the U.S. Supreme Court in the case of *Curtis* v. *Loether,* 415 U.S. 189, held that American citizens who suffer housing discrimination are victims of a "dignitory tort," and that humiliation, whether one is an actual homeseeker or a tester fulfilling the responsibility of achieving fair housing, is the same kind of injury. The regulations as proposed will restrict the right of American citizens in enforcing direct actions if they are participants in the FHIP program.

However, we were assured and we were happy to hear Mr. Knapp's testimony that it is the intention of the Secretary that the regulations be limited solely and strictly to this program. While it's clear that there was political capitulation in order to achieve this, in order to satisfy the realtors, by restricting the rights of American citizens to enforce fair housing, at least we know that direct Federal fair housing enforcement in the U.S. district courts around the Nation will remain unfettered if the regulations go into effect.

Finally, Mr. Chairman, with the panel's permission, we would like to have the opportunity to submit a post-testimony submission for consideration.

Senator HECHT. Of course. The hearing record will be open for 2 weeks.

Mr. FRIEDMAN. Very well.

Private enforcement is a priority under the Fair Housing Act for practical reasons having to do with the nature of the acts of discrimination that we are trying to prevent, or to provide remedies for, and the multiplicity and variety of those acts. It is the multitude of daily acts of discrimination in the housing market against individual victims across the Nation that is our principal concern. This Subcommitee is familiar with the often-cited audit survey of American housing markets that was conducted by the National Committee Against Discrimination in Housing in 1977, and published in 1979, under a HUD research grant. That survey reported that in a typical search for a rental or purchase, involving visits to four sales or rental agents, a black seeking to purchase a home had a 48% chance of encountering discrimination on at least one visit, and a black seeking to rent had a 72% chance of encountering discrimination on at least one visit. HUD staff extrapolated from those findings to conclude that about 2 million instances of housing discrimination occurred every year. Experts in statistical methodology may quibble over that extrapolation, but even if the estimate is wrong by half, it is nonetheless staggering and, to put it mildly, deeply disconcerting.

In the war against housing discrimination, the prevention and the redressing of that multitude of individual grievances is infantry work. The waging of that war cannot be left dependent upon Federal personnel resources, or on government enforcement procedures that are available only in widely-scattered Federal offices.

The Administration's Fair Housing Initiatives proposal, particularly the Private Enforcement Initiative, which calls for direct funding of private fair housing groups for private enforcement activities utilizing the several procedures provided by current law but particularly the private right of action, is an unusual, even unprecedented, step. The Federal Government has not previously offered direct funding for private civil rights enforcement activities in any permanent, ongoing way. It is a step that flows from two convictions - one, as I have said, about the essential role of private enforcement. And second, that private fair housing organizations are indispensable to that enforcement effort. They are unique; I do not believe that there are exactly analogous organizations available to provide the same services to, say, victims of employment discrimination. Their role was directly enhanced by the Supreme Court's Havens decision in 1982. The Court there held that testers who had been lied to about the availability of units had standing to sue in their own right. The Court also, in that decision, gave standing to private fair housing organizations to sue to recover damages for actual injury to their own purposes and programs resulting from discriminatory practices in the housing market.[2/] On both holdings, the Supreme Court adopted a position urged upon it by the Administration in an amicus brief signed by Solicitor General Lee, by Assistant Attorney General Reynolds, and, I am pleased to be able to say, by myself.

More importantly, the private organizations are essential as a source of the kind of evidence that is virtually indispensable in a Fair Housing Act case. The garden variety act of housing discrimination usually involves disparate treatment -- a seeker of a sale or rental unit is treated differently from another for no reason other than race. That kind of differential treatment generally can be proved only by testing. There must be some kind of institutional arrangement that individual victims in the local market area can turn to in order to be able to obtain that kind of evidence through professionally trained testers. There is no alternative source for that particular kind of indispensable support of discrimination complaints by individual victims other than the private fair housing groups, and as long as that remains the fact, fair housing enforcement will not get very far without them.

That is the background which led us to introduce the Fair Housing Initiatives proposal over a year ago. The proposal attracted support, but it has also attracted strong opposition. The principal source of that opposition has been the leadership of the 700,000-member National Association of Realtors. That opposition by the Realtors has been a source of concern to us. Our concern has not been limited to the question of whether the Realtors' opposition would prevent enactment of the program. The Administration's proposal was approved by the House Banking Committee notwithstanding strong efforts by the Realtors, although by a close vote. The proposal's outlook in this body was, frankly, somewhat dim. We could not predict whether the Banking Committee, or the full Senate, would adopt the proposal, or what would be the outcome of a Senate-House Conference.

Our concern went beyond that, however, and extended to the probable success of the program even if it was enacted despite the opposition. Our concern focused on the character of the opposition. Here we had a national organization whose many thousands of members had clearly come to believe, however mistakenly, that they were about to be subjected to unfair enforcement procedures and possibly even harassment with the assistance of Federal funds. We did not believe for a moment that there was merit to those fears. After all, testing evidence has been presented to courts in housing discrimination cases for years. Repeated review of testing evidence by the courts and by State and local enforcement agencies, and HUD projects such as the Fair Housing Enforcement Demonstration and the Fair Housing Testing Conference held in December 1984, have contributed to a continuing development of acknowledged standards for conducting thorough, objective and valid tests and to increasing professionalization of testing programs. Nevertheless, there exists undeniably at the core of testing an element that causes us all a certain unease. As a Federal Court of Appeals has

---

2/ Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

said: "It is surely regrettable that testers must mislead commercial landlords and home owners as to their real intentions to rent or buy housing. Nonetheless, we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination."3/ It is not a difficult thing for that residue of unease to become escalated into fear and resentment.

In this democratic Nation, broad consent of the governed is an essential prerequisite to the success of any government effort. If we undertook a program of direct funding of testing by private organizations in an atmosphere of undispelled fear and suspicion, even if founded on ignorance or misunderstanding, held by so large and extensive a segment of directly affected citizens, the ultimate success of the enforcement effort could not help but suffer.

With this in mind, then, Secretary Pierce entered discussions directly with the President of the National Association of Realtors in an effort to reach a defensible understanding that would serve to alleviate the unfounded fears obviously held by so many of the organization's members. For his part, Mr. Wallace and his colleagues showed a clear desire to achieve a significant break from the organization's history of apparent intransigent opposition to legislative proposals in the fair housing area and to testing programs in particular. The Secretary met with Mr. Wallace, and there followed a series of difficult and complex negotiations between NAR's representatives and a team of HUD representatives chosen by the Secretary. The HUD team was chaired by the Secretary's Executive Assistant, Deborah Dean, who had been active in consultations with Congressional and industry sources regarding the Fair Housing Initiatives proposal for more than a year. The HUD team also included:

> --Harry Carey, a senior career attorney on my staff who has been working on fair housing and other equal opportunity matters in the Department for more than 15 years. For eight months in 1983, he served, on detail, as Acting Director of the Office of Fair Housing Enforcement under the Assistant Secretary for Fair Housing and Equal Opportunity.
>
> --Dr. John M. Goering, a career professional in the Office of Policy Development and Research. Dr. Goering has published over two dozen articles and written two books on housing, race and Federal policies. He was the project manager, or

---

3/ Richardson v. Howard, 712 F. 2d 319, 321 (7th Cir. 1983).

> Government Technical Representative, for the Fair Housing Enforcement Demonstration, the Evaluation of the Fair Housing Assistance Program, and the Fair Housing Testing Conference. He is now a Congressional Fellow with the Senate Subcommittee on Immigration and Refugee Policy.
>
> --Susan Zagame, currently Deputy Assistant Secretary for Policy, Financial Management and Administration in the Office of Housing and prior thereto Deputy Assistant Secretary for Operations and Management in the Office of Fair Housing and Equal Opportunity.

I did not participate directly in the negotiations, although I reviewed the successive drafts of the Guidelines as they developed. Miss Dean is present and will be available to answer any questions that Subcommittee members may wish to ask regarding the actual course of the negotiations.

The details of the understanding, as incorporated in Section 602 of S. 2507, are, I believe, fully supportable. Their requirements as to recruitment and training of testers, documentation of test results, and matching of tester profiles draws upon, widely accepted standards reflected, among other places, in the Guide to Fair Housing Law and Enforcement published by HUD in 1979 and in the proceedings of the two-day HUD-sponsored Conference on Fair Housing Testing held in December 1984.

It is true that they exclude from eligibility for funding under the Private Enforcement Initiative certain types of tests that are wholly legitimate enforcement devices and that have been recognized as such by courts and by administrative agencies. This limitation flows particularly from the requirement that there be at least two paired testers as part of every test. This means, for example, that if a homeseeker lodges a complaint of discrimination with the fair housing organization, it will not be sufficient, if the testing is to be funded from this source, to send one tester matched with the complainant and to stop there. Some fair housing organizations do bring enforcement actions based on a report by a single tester, and such evidence has been accepted as probative and sufficient by courts and by administrative agencies. At the same time, we know that virtually all fair housing organizations conduct paired tests at least some of the time, and some have told us that they perform paired tests all of the time. So even if the "unpaired" test is excluded from funding eligibility under the Private Enforcement Initiative, it seems clear that there remains a broad range of useful and necessary testing activities that can be funded from that source. We concluded that the exclusion of some legitimate activities seemed a small price to pay if we could succeed in allaying the destructive level of opposition and resentment that I referred to earlier.

I have also heard an expressed concern that courts may apply these guidelines to determine the credibility and the probativeness of tests other than those funded under the Private Enforcement Initiative. I think that there is no basis for any such concern. (For that matter, I do not believe that compliance with the Guidelines should be considered by a court as a standard for admissibility or probativeness of the evidence even where a test is funded under the Private Enforcement Initiative. There will be separate sanctions for noncompliance with the Guidelines by program participants, as provided in Section 602(f) of the Committee bill, but that should have nothing to do with a Court's consideration of evidence.) By their terms as stated in the statutory language, the Guidelines apply only to tests funded under the Private Enforcement Initiative of the Fair Housing Initiatives program. They do not even apply to testing by private organizations that is funded through the Administrative Enforcement Initiative pursuant to contracts between State or local agencies and private groups. That omission is not a clever, quiet loophole; it is deliberate and acknowledged. The limited application of the Guidelines will be stressed in the Department's regulations incorporating them, as I would hope it would also be in Committee or floor discussions of them.

Mr. Chairman, on behalf of the Department, I applaud the Committee for its action in including the Fair Housing Initiative program in the bill reported by the Committee. If enacted, we believe that the Program will be a significant source of support for expanded, effective fair housing enforcement.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

THE GENERAL COUNSEL

July 11, 1986

Honorable Chic Hecht
Chairman, Subcommittee on Housing
and Urban Affairs
Committee on Banking, Housing,
and Urban Affairs
United States Senate
Washington, DC 20510

Dear Senator Hecht:

You extended a general invitation to the witnesses who appeared at the Subcommittee hearing on the Fair Housing Initiatives Proposal to supplement the record as to any points on which they thought further clarification might be desirable.

A principal issue raised at the hearing was the impact of the guidelines on testing activities other than those funded under the private enforcement initiative of the FHIP program. I have dealt with this point in my prepared statement, my responses to questions at the hearing, and my written responses to questions presented by Senator Proxmire, so that I do not think that more need be said at this time. There are, however, certain other points on which I would like to add a word.

Several questions arise out of the "bona fide allegation" requirement. The function and significance of this requirement relates only to the selection of the target for testing and does not limit the scope of the ensuing investigation or of any complaint that may be based thereon. The "bona fide allegation" is not necessarily a formal client complaint, it is simply a source of reasonable belief of violations independent of the testers or the testing organization. Once this foundation for selection of a target is established, an investigation may be commenced and, thereafter, a complaint may be filed by any aggrieved person based on the investigation without necessary reference to the original "bona fide allegation." As emphasized by Mr. North in his prepared statement, "the tester and testing agency have those rights of action guaranteed them under the Supreme Court's decision in [Havens]."

It has been suggested that the guidelines limit, or preclude, utilization of this funding source for systemic testing. This is not the fact. The guidelines limit the basis on which a target of systemic testing may be selected, as

indicated above. It is not the fact, however, that all, or even most, systemic testing - i.e., testing for systemic, or "pattern or practice" violations - is based not on allegations but on less specific foundations such as demographic analysis. Where a test conducted in response to an allegation discloses the existence of a pattern or practice of discriminatory housing practices, the guidelines provide for variances in the profiles of testers in order to facilitate collection of data on policies, practices and procedures which appear to be discriminatory. There is no limitation on the number of such tests which can be funded; the only requirement is that the tests conducted involve paired testers who are matched with each other with respect to housing needs and demographic profiles. Accordingly, the guidelines provide for funding of tests for systemic violations.

Notwithstanding the above, a question has been raised about the ability of testers or testing organizations to commence suits in their own behalf in view of the limitations contained in Section 602(d)(3)(A) of the Committee bill, requiring that neither the tester nor the "organization conducting the test . . . has any economic interest in the outcome of the test without prejudice to the right of any person or entity to recover damages for any cognizable injury."

The intent of the guidelines to fully preserve the rights of action extended by the Havens decision is too plain to be negated, as indicated in the statement to the Subcommittee by Mr. North quoted above. Indeed, in the document negotiated between HUD and NAR, the provision quoted above is followed by a citation to Havens. The intent of the foregoing provision is to prevent contingency payments to testers based on the outcome of tests, or similar arrangements that might create an inducement to solicit a discriminatory act. A financial recovery that might be obtained by an individual or organizational plaintiff in a Fair Housing Act suit is only compensation for established actual injury. It simply cannot be said that the possibility of recovery for actual injury that has not yet been sustained is an inducement to sustain the injury. The possibility of recovery of damages for actual injury is not an "economic interest in the outcome" within the meaning of this provision.

Finally, there appeared to be a misunderstanding on the part of certain witnesses regarding the requirements of the provision contained in Section 602(c)(3)(B) referring to "one or more visits by at least two paired testers." This refers to at least two testers, not at least two tests. Therefore, it does not require at least four testers, as some witnesses appeared to believe.

I appreciate this opportunity to add these remarks to the record. I also want to extend to you again our appreciation for your having conducted the hearing so that the Fair Housing Initiatives Program proposal, and the proposed guidelines governing eligibility for funding under the private enforcement initiative, may be more fully and widely understood.

Very sincerely yours,

John J. Knapp

Senator HECHT. Is that it?

Mr. FRIEDMAN. Yes, sir.

Senator HECHT. You speak very eloquently without notes. It's very unusual in a hearing.

Mr. Martin.

STATEMENT OF GALEN MARTIN, EXECUTIVE DIRECTOR, KENTUCKY COMMISSION ON HUMAN RIGHTS

Mr. MARTIN. I'm executive director of the Kentucky Commission on Human Rights, a post I've held since 1961. I am an attorney.

Kentucky has made outstanding progress in eliminating discrimination in housing. Testing has been an integral part of strong enforcement which has produced a documented decrease in discrimination. I welcome this opportunity to share with you our experience which demonstrates that testing is essential and that the proposed restrictions are unnecessary.

KENTUCKY'S PROGRESS ON HOUSING DISCRIMINATION

Before the passage of title VIII in 1968, housing discrimination was open and advertised. In Kentucky, we had classified ads that set out the discriminatory concepts. Landlords could turn away black renters with the explanation that "We don't rent to coloreds."

However, in the 18 years since passage of the Kentucky Fair Housing Act, the climate has changed. Overt discrimination is no longer an acceptable standard of behavior. As we often say in Kentucky, they have gone to northern style discrimination. They're very polite, very courteous, and very devious. Testing is absolutely essential to show what is occurring in the real estate market.

Discrimination is unlawful and those who wish to continue to discriminate do so in violation of the laws, but they have been driven underground in the way they operate.

In most instances, this discrimination takes the form of misinformation about the availability of the units. Giving misinformation about availability is strictly and explicitly prohibited by the fair housing provisions of the Kentucky Civil Rights Act, but we find that increasingly the discrimination is hidden. The only way to find out about subtle discrimination is to test for it.

Testing is an essential tool and we don't see any reason to restrict that device as has been proposed and as HUD has agreed to. If we had been required to wait until an identified would be black homeseeker became suspicious, most if not all the cases that we have had in the last 5 years would not have been filed and the clandestine discrimination would have continued unsuspected and unchecked.

That's why the amendment offered by Congressman St Germain is still objectionable, even though it's better than the Senate version. Restricting the funding of testing to tests after a complaint of discrimination has been filed, effectively guts fair housing testing. In our experience in Kentucky, for more often than not, it is the test that initially signals the existence of discrimination. There is no aggrieved individual because he or she has been politely turned away without a hint of discrimination.

Even in 1977 when we participated in the HUD-funded national series of tests, we had a most vivid example of this. The black tester came back and was actually apologetic about having taken the time of the people to conduct the test. But only when the test booklets were compared was it obvious that there had been discrimination. When the black tester heard or saw the report of the white tester, he was shocked and embarrassed at his own gullibility. This is the pattern that we see time after time.

That's why testing without regard to a specific allegation is essential.

COMPREHENSIVE TESTING GETS RESULTS

Comprehensive testing does get results. It confirms the nondiscriminatory practices of the law-abiding landlord and we have tremendous evidence of that in Kentucky. But it also points a clear finger at the unscrupulous real estate practitioner who continues to discriminate.

We contend that a test which is not conducted in response to an individual complaint is equally valid and equally necessary to show discrimination.

Since 1977, there have been well over 2,000 tests of housing in Kentucky and clearly it shows a very significant decrease in the incidence of discrimination directly as a result of testing. There has been a decrease also because of the publicity that's been given to the results of that testing, to the complaints that have been filed as a result of the testing, and to the general pattern of a reduction in discrimination.

Our experience shows the need for funding especially for private fair housing groups. The civil rights agencies around the country have not been as deeply involved in the effort for fair housing as they have for fair employment. I think there are historical reasons for this. Partly it goes to the availability of funding through EEOC and the lack of funding through HUD. It took HUD a long, long time to get any fair housing funding after 1968.

But whatever the reasons are, this gap has been filled in by the private fair housing groups. They are very effective. They have not been inhibited by the pressures of HUD. They have been very independent and very active and have done a fabulous job. This is the reason why the State agencies and the local agencies, based on our experience, believe that they ought to be funded. We think they ought to be funded without the restriction of the amendments.

We think the tremendous decrease in discrimination in apartment rentals in Kentucky since 1977 is very significant. We've done tests nearly every year since then.

In 1977, discrimination in apartment rentals was occurring 50 percent of the time based on our part in the national study. By 1980–81, that discrimination was occurring only one-quarter of the time. By 1985, the discrimination in apartment rentals was down to less then 10 percent. These tests were more extensive in 1985 and in 1980 and 1981 than they were in 1977. They were more scientific. And they showed what's happening in the real estate industry in Kentucky.

We've had great cooperation from Kentucky real estate people and we really don't understand the role of the Washington lobbyists in working with HUD to restrict testing.

Our testing has shown how much the housing industry in Kentucky has changed and we wish that there would be an opportunity for unfettered housing testing in the rest of the country and strong enforcement, and all the other tools that are needed to eliminate discrimination without these restriction. We have no evidence, no experience whatsoever, in the more than 2,000 tests that we know about since 1977 to suggest that these restrictions are needed or desirable.

I think that's the essence of my testimony.

[The complete prepared statement follows:]

STATEMENT IN SUPPORT OF FUNDING THROUGH HR-1
FOR PRIVATE FAIR HOUSING GROUPS
FOR TESTING WITHOUT NEEDLESS RESTRICTIONS

FOR PRESENTATION
TO
THE HOUSING AND URBAN AFFAIRS SUBCOMMITTEE
OF THE
SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS

BY
GALEN MARTIN
EXECUTIVE DIRECTOR
KENTUCKY COMMISSION ON HUMAN RIGHTS

June 18, 1986

I am Executive Director of the Kentucky Commission on Human Rights, a post I have held since 1961. I am an attorney. Beginning in 1956, I have worked in the South for desegregation of students, teachers, public places, housing and employment. I was president of The National Association of Human Rights Workers in 1967 and the International Association of Official Human Rights Agencies 1983-85.

Kentucky has made outstanding progress in eliminating discrimination in housing. Testing has been an integral part of strong enforcement which has produced a documented decrease in discrimination. I welcome this opportunity to share with you our experience which demonstrates that testing is essential and that the proposed restrictions are unnecessary.

Testing is a vital element in the nation's current effort to eliminate housing discrimination in the 1980s. Before the passage of Title VIII, the federal fair housing law in 1968, housing discrimination was open and advertised. Classified ads in Kentucky and numerous other states solicited "white only" tenants or promoted "white communities". Landlords would turn away prospective black renters with these explanations; "we do not rent to coloreds" or "the neighbors would object if I sold to a Negro". Discrimination was overt and testing unnecessary.

However, in the 18 years since passage of Title VIII the climate has changed. Overt discrimination is no longer an acceptable standard of behavior. Discrimination is unlawful and those who wish to continue to discriminate, do so in violation of federal and state law. But discrimination has not ceased, rather it has been driven underground.

"White only" advertising has been replaced with the "Equal Opportunity Housing" logo and overt refusals have been replaced with representations that, "we just rented the last available unit". Black and other minority home seekers are now politely turned away with explanations that sound so reasonable that they never become suspicious. The packaging has changed, but discriminatory practices remained. Discrimination in 1986 has been camouflaged.

To find hidden discrimination we must use a sophisticated tool. Without a doubt the most effective tool for the discovery of this hidden discrimination is TESTING. Testing for fair housing opens the curtain and looks behind the polite refusal and reasonable sounding explanations.

In Kentucky testing is our primary investigative tool for dealing with housing discrimination. In the last five years half of our housing cases have been filed as a direct result of tests which signaled the probable existence of discrimination. If we had been required to wait until an identified would be black home seekers became suspicious, most, if not all, of these cases would never have been filed and this claudestine discrimination would have continued unsuspected and unchecked.

This is why the amendment offered by Congressman St. Germain is still objectionable even though it is better than the Senate version. By restricting the funding of testing to only fund tests done after a complaint of discrimination has been filed effectively guts fair housing testing. For more often than not it is the test that initially signals the existence of housing discrimination. There is no aggrieved individual because he/she has been politely turned away without a hint of discrimination.

No better illustration of this incidious discrimination exists than the experience of one of our test teams. In this typical test a black and a white male, matched for income, family size, and posing as prospective rentees visited a local apartment complex. The white visited the rental office first and a few minutes after he left the black visited the office. A few minutes after the black left the white followed up his inquiry with a phone call to the rental office. Neither testor discussed his experience before reporting the results to the testing supervisor. The black testor prefaced his report with an explanation that he had found no evidence of discrimination. He said he had been treated with the utmost cordiality. The rental agent had explained, with great care, that nothing was available and he was encouraged to get on the "waiting list." The black even apologized to his testing supervisor for the obvious wasted time. However, when this black testor heard the report of the white testor he was shocked and embarassed at his own gullibilty. The white testor had been told that there were several apartments available for immediate rental. He had been encouraged to inspect and rent one and had been told there was no waiting list. When he called back after the black test and identified himself he was assured that several apartments were still available. If an experienced and trained testor can be fooled, the unsuspecting black home seeker doesn't stand a chance of detecting discrimination.

Comprehensive testing gets results. It confirms the nondiscriminatory practices of the law abiding landlord and real estate broker and points a clear finger at the unscruplious real

estate practioneer who continues to discriminate. Testing is no threat to those who comply with the law, but it will flag the violator just as the radar trap catches the speeding motorist.

The individual who suspects he or she has been discriminated against and reports the incident to a fair housing group or civil rights agency is rare. When such instances are reported, the conduct of a test is considered to be a valid means of verifying or not verifying the report. We contend that a test which is not conducted in response to an individual complaint is equally valid and equally necessary. Whether in response to a complaint alleging discrimination or as part of an ongoing fair housing strategy, illegal practices can be detected and documented when information obtained by two or more testers is available for comparison. The bona fide homeseeker does not have this comparison available and consequently cannot detect and therefore report discriminatory practices.

Since 1977, there have been well over 2000 tests conducted in Kentucky. The results suggest the following:

1. There has been a decrease in the incidents of discrimination directly as a result of testing cases which have resulted in conciliation agreements and the correction of past practices.

2. There has been a decrease in the incidence of discrimination as an indirect result of testing cases, published reports and media coverage due to market awareness of the program and the potential for firms or complexes to be tested.

3. In spite of the decrease in the incidence of discrimination, testing initiated by the Commission continues to detect illegal

practices in the market which have not been reported by bona fide home seekers thus substantiating the necessity of continuing a testing program.

Beginning in 1977 with the Housing Market Practices Survey (HMPS) financed by HUD through the National Committee Against Discrimination in Housing we have had nine years of extensive and intensive testing. Our experience shows the need for funding especially for private fair housing groups. Nothing whatsoever in our experience suggests the need for restrictions that will shackle scientific inquiry about the nature and the extent of discrimination. We agree that testing must be objective, reliable and controlled, but we see no foundation that would preclude a whole category of testing which has proven to be needed and extremely valuable. Because of the tremendous decrease in the incidents of apartment discrimination which we have carefully documented during the last nine years we have great difficulty understanding why an association of real estate people would want to limit testing.

In 1977 apartment discrimination occurred half the time in the national study conducted in Louisville and Lexington. In 1980 and 81 similar, but more intensive audits showed that apartment discrimination in those cities was occurring only one quarter the time. By 1985 apartment discrimination was occurring only 6.9% of the time in Lexington and 7.4% of the time in Louisville.

Kentucky's real estate industry supports fair housing. Cooperation between Kentucky's real estate leaders and the commission has been so longstanding that we have difficulty understanding the position of the Washington representatives of the

LAW OFFICES OF
AVERY S. FRIEDMAN
ATTORNEY AND COUNSELLOR AT LAW
701 CITIZENS BUILDING
CLEVELAND, OHIO 44114
(216) 621-8282

Post-Testimony Submission of Avery S. Friedman
Former Chief Counsel
The Housing Advocates, Inc.

on the

FAIR HOUSING INITIATIVES PROGRAMS

before the

SUBCOMMITTEE ON HOUSING AND URBAN AFFAIRS
UNITED STATES SENATE

June 30, 1986

Dear Senators Garn, Hecht and Proxmire:

We are appreciative of your consent to submit additional considerations subsequent to the testimony taken by the Subcommittee on June 18, 1986. We believe these additional comments may assist in clarifying some of the concerns which were expressed by the witnesses and by members of the panel.

I. INTRODUCTION

Housing discrimination is often a discrete and subtle practice, but its pernicious effects go far beyond the singular event of denial of housing opportunities. Often undetected, housing bias often victimizes segments of our society least able to fight back against such unlawful activity while promoting an apartheid antithetical to American democratic principles.

The battle against housing discrimination has made headway in recent years with nearly uniform positive interpretations of Title VIII by the federal courts. However, much of the struggle over the past eighteen (18) years since the enactment of the Fair Housing Act has been procedural; in addition to evidentiary considerations, much time has been spent in the federal courtrooms of our nation clearing away many of the unresolved procedural issues such as extent and breadth of liability, standing, relevance of statistical data, etc. It has truly been in recent years only that victims are starting to use

the federal courts generally as a quick, inexpensive and powerful method of obtaining housing and to secure damages for discrimination. See Susz, "Federal Fair Housing," Case & Comment, Vol. 89 No. 3 (May-June, 1984), cited in HUD Conference on Fair Housing Testing: Final Summary Report (GPO: 1985-529-009:30901). The many Americans who have served on federal juries and who have testified as witnesses in the United States District Courts throughout the nation have in recent years demonstrated generally that the "system" can work well for victims of housing discrimination in vindicating rights promised by the Fair Housing Act.

II. SOME REALITIES ARISING OUT OF THE NAR-HUD PRIVATE ARRANGEMENT CONCERNING FHIP GUIDELINES

Section 602 of S. 2507, the FY 1987 Housing Authorization Bill, authorizes the Secretary of HUD to provide grants to public or private organizations formulating or carrying out programs to prevent or eliminate discriminatory housing practices. One of the elements, the one of concern to fair housing groups and civil rights advocates generally, is the Fair Housing Initiatives Program (FHIP). It has been basically supported in concept, but raises significant questions because guidelines were developed without the very persons and entities which pioneered and refined the standards which the federal courts have uniformly adopted.

Instead of building in to the proposed guidelines the well accepted and sensible standards which have offered all parties, plaintiffs and defendants alike, reliable, credible and reasonable guidelines, private arrangements between HUD personnel and the National Association of Realtors resulted in the establishment of "guidelines" that are objectively burdensome and far exceed the fine-tuned standards which the federal courts have carved out for nearly two decades.[1]

[1] Shockingly, the NAR, in its prepared Statement of June 18, 1986, submitted the "Many of these [Fair Housing Act] suits are the result of unreliable 'sweep' testing." (p. 3). When pressed by Senator Proxmire, NAR's General Counsel could only refer generally to one case and failed to identify names or agencies litigating cases where the evidence was comprised of unreliable "sweep" testing. We are unaware of any reported fair housing case addressing the question of reliability (or unreliability) of "sweep" testing, a phrase unknown to fair housing advocates.

For example, two (2) paired testers in testing a sales transaction is required under the guidelines. This is patently unreasonable. To suggest that two paired testers, or four (4) witnesses, would be the only valid method of establishing a violation of Title VIII under the FHIP program would simply be an outrage. These requirements are grossly inconsistent as excessive in terms of existing federal fair housing legal principles.[2]

The guidelines admittedly strip away from Americans causes of actions presently available under the Fair Housing Act if a fair housing group is to receive federal funds under FHIP. If, for example, a black or female American suffers the humiliation of housing discrimination, whether an actual homeseeker or a tester for a participating agency, those rights ordinarily available to every other American will be denied if the person is affiliated with a fair housing group or participates in the law enforcement process as a "private attorney general" in the enforcement of the Fair Housing Act. It is simply indefensible for HUD to support a program which takes away from Americans, active in the fair housing enforcement process, the right to vindicate rights under Title VIII. Moreover, the guidelines incorporate a definition of "bona fide" which eviscerates further the right to pursue fair housing rights by citizens of the nation. Indeed, as the Congress originally discussed and as the United States Supreme Court recognized, the "actual victims" of housing discrimination are not only the direct victims, but the "whole community." Trafficante v. Metropolitan Life Ins Co., 409 U.S. 205 (1972).

[2] It was this particular issue expressed by Senator Heinz at the hearing which was of concern to him. Cited as an example was the June, 1986 case of Ferguson v. Zortman, Civil Action Number 85-1561, tried before U.S. District Judge William W. Caldwell of the United States District Court for the Middle District of Pennsylvania (Harrisburg). An all white federal jury found housing discrimination in violation of Title VIII based upon the carefully delivered instructions of the federal court and based upon the evidence of one (1) tester, a white next-door neighbor, and an interview with an agent of the Pennsylvania Human Relations Commission. The plaintiffs were granted $25,000.00 in damages and related costs by the federal court. Such relief would obviously have been unavailable to these Americans under the FHIP guidelines and Senator Heinz's fears would have been a reality if such guidelines would have controlled.

Finally, it is important to restate that both the General Counsel of HUD affirmatively states and the General Counsel of NAR concedes that none of the guidelines should be construed as governing federal fair housing litigation. Although NAR has indicated a concern for "innocent brokers,"[3] the standards for measuring discrimination have, since the enactment of the Fair Housing Act, employed the same standards of reliability and credibility as are required in any type of federal litigation.

III. CONCLUSION

Private fair housing groups and their volunteers and staff remain America's "chosen instruments of Congress" in enforcing the nation's anti-discrimination laws. Izard v. Arndt, 483 F. Supp. 261, 265 (E.D. Wis. 1980). FHIP should be enacted as part of the housing authorization bill and objective standards for guidelines should be developed consistent with well established and sensible federal fair housing principles. The "procedural defects" suggested in the NAR June 18th Statement are, in fact, non-existent and the failure of proof should be governed by appropriate federal rules of evidence, not legislative guidelines which far exceed requirements of existing law.

We are satisfied that HUD may benefit by consulting with the many high-spirited fair housing and real estate activists together in developing an internal regulatory scheme within the agency for the FHIP program. In present form in particular, we believe that Senator Heinz's fears that the inconsistency of the presently proposed guidelines may undermine the protection of Americans from illegal housing discrimination are well founded. Therefore, intensive compromise efforts would be warranted.

Respectfully submitted,

AVERY S. FRIEDMAN

[3] We are certain that the General Counsel of NAR did not intend to misrepresent the truth when he stated that the broker in Heights Community Congress v. Hilltop Realty, Inc. was "exonerated." Although the broker was not liable personally, the court held exactly the opposite of what the General Counsel represented to the panel, finding, inter alia, that the broker manifested a "corporate intent to continue to violate [the Fair Housing Act]." 629 F. Supp. 1232, 1293. The broker's liability was expressly affirmed by the United States Court of Appeals for the Sixth Circuit, 774 F. 2d 135 (6th Cir. 1985) and the United States Supreme Court let the lower court decisions stand. 106 S. Ct. 1206 (Feb. 24, 1986). On June 12, 1986, the broker was put on notice that a hearing to determine whether its license to practice real estate will be revoked or suspended will take place within thirty (30) days.

Senator HECHT. Thank you very much.

Senator Proxmire, at your request, we have panel 3 on because I understand you wanted to ask questions of panel 2. Do you have an opening statement?

Senator PROXMIRE. I do have an opening statement, Mr. Chairman. I very much appreciate your kind accommodation. I had to make a statement on the floor this morning and I had no choice except to go to the floor first and then come here.

If I might read my statement, it's not very long.

Senator HECHT. Senator Proxmire, you do whatever you wish.

OPENING STATEMENT OF SENATOR PROXMIRE

Senator PROXMIRE. OK. I requested that the chairman call this hearing to receive testimony concerning the proposed guidelines for fair housing testing. These guidelines were included as section 602 in S. 2507, the Housing Act of 1986, which was reported out by the Banking Committee on May 21. S. 2507 is now pending before the Senate and is expected to be called up in the next week or so, possibly tomorrow if we finish the tax bill today.

The major question before us today is whether the guidelines should be enacted into law. The committee has asked representatives from HUD, civil rights and fair housing organizations, and the National Association of Realtors to present their views. The written statements and the responses to the questions will, I anticipate, provide the Senate with a valuable record which it can consider before taking final action on the housing legislation.

Now, I felt the need to request this hearing because of the unusual way the guidelines came into being and eventually found their way into the committee bill. I received calls from a number of fair housing and civil rights groups who were outraged that secret negotiations could so quickly lead to proposed legislation.

They felt strongly and rightly, I believe, that they should be heard on a matter that is important to them as practitioners in the field of fair housing and to millions of Americans who are the victims of discrimination in housing.

The proposed guidelines for testing under the Private Initiatives Program were developed by the National Association of Realtors and HUD in private negotiations over some weeks. Not once during that period, I am told, did HUD call in or consult with fair housing representatives.

On May 12, the guidelines agreed to by the HUD and realtor negotiators were unanimously approved by the board of directors of the NAR. The board declared its support for Secretary Pearce's Private Initiatives Program but conditioned the approval on enactment of the guidelines as part of the program.

I understand the realtors have subsequently lobbied hard to assure that the guidelines become law. We'll hear why, shortly.

It's been reported that HUD did not intend that the guidelines should become part of the law. It is certainly unusual that guidelines for administering a program should become a subject of a press conference before there's a program to administer.

It is equally unusual for guidelines to be incorporated into the same law that authorizes a new program. What I know about

guidelines is that the ones which HUD was required more than 2 years ago under the 1983 pet law still have not been promulgated.

HUD has not, to my knowledge, indicated its views about the guidelines to the committee. I guess perhaps they did this morning with the opening witness, John Knapp, but until that point they had not done so.

I want to welcome you who have come to testify. We stand ready to hear why the realtor-HUD guidelines should or should not become part of the fair housing initiatives law.

Mr. Friedman, FHIP guidelines state that a tester or organization may not have an economic interest—economic interest is the language used—in the outcome of a test and the right to recover damage.

Does that radically change existing law?

NEW REGULATIONS WOULD CUT OFF A PRIMARY ENFORCEMENT METHOD

Mr. FRIEDMAN. Mr. Proxmire, that eviscerates the existing state of the law since the 1974 Supreme Court decision in *Curtis* v. *Loether* of the dignitary tort suffered by Americans who suffer housing discrimination and also of the fair housing councils which one Federal court characterized as "the chosen instruments of Congress." By pulling the plug on these organizations and these testers to enforce the Fair Housing Act, this will radically change the present and future of the law.

So what these regulations are going to do within this restricted program is basically cut off a primary enforcement method in uncovering unlawful housing discrimination.

Senator PROXMIRE. Thank you.

Senator HECHT. I will ask some questions. If you have some more, you can come back.

First of all, I have been notified that the committee did not receive copies of testimonies from some of the witnesses on panels 2 and 3. I would like to ask of you, if you haven't already submitted them, to submit your statements to one of the staff for the record.

What benefits would you see to including the FHIP guidelines as part of statutory language rather than relying solely on the Department regulations? Would you like to answer that, Mr. Friedman?

Mr. FRIEDMAN. If I may.

Senator HECHT. Sure.

Mr. FRIEDMAN. If Congress makes clear that this limited HUD program and the guidelines that apply to it apply exclusively to the program to ensure that the Federal district courts around the Nation don't misconstrue these guidelines as some sort of guide for a court to determine the validity or invalidity of a test, then the problem in part would be resolved.

My concern is this. American citizens suffer housing discrimination every day and under the existing Fair Housing Act they have direct access to the U.S. district courts. Every Federal district court and jury evaluates tester credibility and evidence. The Realtors' sponsored legislation or proposal basically seeks to substitute normal credibility considerations by using guidelines.

If Congress makes clear that these regulations deal exclusively with this limited program and have no application to the rights of Americans who enforce their rights directly in the Federal district courts, I think a lot of problems will be solved.

Senator HECHT. Do you want to comment on that, Mr. Martin?

Mr. MARTIN. I think Avery has done great with that.

Senator HECHT. All right. Let me ask the next question.

How would you change the guidelines to better ensure the practice of fair housing?

Mr. FRIEDMAN. Oh, they would be radically revamped. The guidelines themselves have so many problems that we could spend the rest of the day here.

My understanding, however, from Mr. Knapp's testimony is that this was the compromise arrived at. In a sense, it's a sellout to the realtors by having their views substituted for regulations.

MAINTAIN DIRECT ACCESS TO FEDERAL COURTS

My concern as a Federal fair housing lawyer, Mr. Chairman, is to continue to have direct access to the Federal courts around the Nation to protect American citizens in fighting back against housing discrimination.

If it were possible to write guidelines that were fair, as I said, we could spend all day here. My sole concern is, again, maintaining direct access to our Federal courts.

Senator HECHT. Thank you. Mr. Martin, do you have any comments?

Mr. MARTIN. No.

Senator HECHT. Senator Proxmire.

Senator PROXMIRE. I have two brief questions for Mr. Martin.

No. 1, the initiatives guidelines, Mr. Martin, require at least two individual testers in order to establish a violation of law. Is this evidence presently required under fair housing law?

Mr. MARTIN. No, not any law that I'm aware of. This is just a deal made between HUD and the realtors. I go back to what they say in Harlan County in that great folk song, "There are no neutrals there," and I don't know why——

Senator PROXMIRE. There are no what?

Mr. MARTIN. "There are no neutrals there" in Harlan County, KY. I don't understand why HUD is all the sudden on the side of the realtors. They ought to be a law enforcement agency. That's the overwhelming need in this country, for Federal enforcement of housing legislation. Civil rights is the only area I can think of in all of our social undertakings—where we have such shabby procedures. HUD has no business working out a compromise with the realtors. It shouldn't have been worked out by anybody, but it most certainly shouldn't have been done by HUD.

We don't know of any experience—and we've done extensive testings in virtually all the years since 1977—we know of no experience which justifies what they have agreed to.

Senator PROXMIRE. Mr. Martin, when you say there are no neutrals in Harlan County, is that the county where they had the Hatfield and McCoy feud?

Mr. MARTIN. No, not quite.

Senator PROXMIRE. You don't fool around in that county.

Mr. MARTIN. You know the rest of the song. It says, "You'll either be a union man or a thug for J.H. Blair," the sheriff.

HUD SHOULD BE ON THE SIDE OF ENFORCEMENT

But the point is, HUD not only ought not to be on the side of the realtors; they ought not to be neutral. They ought to be on the side of enforcement. And what they have agreed to does not put them on the side of enforcement. It puts them in the position of agreeing to a restriction on enforcement which is not based on any experience that we are aware of. We can't understand why they undertook to enter into this compromise. It does not belong in the legislation. It obviously should not be there. There ought to be a separation with regard to that. Obviously it's not the way to deal with regulations and that's essentially what they've done. They've got the cart before the horse. They have put the regulation into the legislation before you've passed the law. Obviously, under separation of powers, that's not the way it's supposed to be done.

Senator PROXMIRE. As I understand it, the initiatives guidelines also require two paired testers or four separate witnesses—two pairs, four witnesses—to establish one violation in a sales transaction.

Is such evidence presently necessary to show a violation of the Fair Housing Act?

Mr. MARTIN. Not in our experience. The basic idea is to scientifically and independently and objectively find out whether there is or isn't discrimination. And whenever you come along and fetter scientific pursuit by saying, well, it's got to be two or four or six or whatever, then you're not being scientific. That's the point.

We don't have any objection to two tests. The main problem with the St Germain amendment is that it says that this money is going to be restricted so that you can't have systemic testing, and that is ridiculous. What we need is systemic testing and the real estate industry in particular needs systemic testing. They ought to be doing systemic testing instead of trying to get HUD to restrict it being done by the fair housing groups.

They ought to be out "shopping" their own members. Holiday Inns, for example, "shop" all of their franchisees to be sure they are following the rules. Well, the real estate industry ought to be shopping its members to see that they are complying with their own guidelines. Instead of doing that, they've gone to the agency that ought to be the law enforcers and got them to agree to a compromise, and we just don't see any experience to support that restriction.

Mr. FRIEDMAN. Senator Proxmire, if I may, in response to your question, of the approximately 275 reported Federal fair housing decisions, there is not one that has ever required anywhere near that kind of evidence to establish a violation of a singular sales transaction.

Senator PROXMIRE. So that would indicate that if this goes into the law it's going to be extraordinarily hard to enforce the fair housing provisions of the law and the intent of the law?

Mr. FRIEDMAN. Well, it will be terribly difficult within this limited HUD program for fair housing organizations and testers to establish a violation because the argument is that it's inconsistent with HUD guidelines. It doesn't make it any less valid, but apparently HUD intends to employ its own policeman to make sure that these fair housing groups are doing it consistent with their guidelines.

Senator PROXMIRE. How many of those 275 cases would have been brought if you would have had to meet this requirement of law, if you had to meet the requirement of four testers and so forth?

Mr. FRIEDMAN. None.

Senator PROXMIRE. None; is that right?

Mr. FRIEDMAN. None. The reality of fair housing law is that if you show a disparity in treatment based on color, whether it's 1 witness or 10, a violation of law is established, and it has been the experience in America that essentially in these trials you have one, maybe two, testers and that's it. And to suggest that you need four separate witnesses for one violation is simply absurd.

Senator PROXMIRE. Thank you.

Thank you, Mr. Chairman.

Senator HECHT. Thank you both very much for that very spirited dialog.

Next is panel 2. I thank you for graciously waiting for panel 3.

As I mentioned before, at the end of 5 minutes I will let you know and I will ask you to summarize your remarks.

Ms. Simmons, would you please start?

STATEMENT OF ALTHEA T.L. SIMMONS, DIRECTOR, WASHINGTON BUREAU OF NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Ms. SIMMONS. Mr. Chairman and members of the subcommittee, I'm Althea T.L. Simmons, director of the NAACP's Washington Bureau.

The NAACP in its 77th year is the Nation's oldest and largest civil rights association with a half million members and 2,100 units in all 50 States and the District of Columbia.

Today I am speaking on behalf of not only the NAACP but also the Leadership Conference on Civil Rights, which is a coalition of 170-some organizations, labor, religious, fraternal, and civil rights groups.

NAACP SUPPORTS THE PROGRAM

The NAACP and the Leadership Conference support the administration's Fair Housing Initiatives Program. Our Nation has not yet lived up to its promise, Mr. Chairman, that was set forth in title VII of the 1968 Civil Rights Act, some 18 years ago. We still have racial discrimination in America.

In some instances, that discrimination occurs when a prospective homeowner fails to secure an adequate loan commitment unless he or she elects to stay in his or her racial neighborhood. In other cases, the discrimination often occurs when an apartment manager unilaterally decides it's not in the best interest of the owner or the

national real estate groups. When the Kentucky Commission was seeking fair housing amendments in 1968 we had the cooperation of many real estate leaders including William Snyder, a former state president. We know of many instances of cooperation and none in which the industry has opposed enforcement of Kentucky's Fair Housing Act or the testing program which has been an integral factor in the change that has occurred in the bluegrass state.

There are at least six key features which have measurably reduced housing discrimination in Kentucky:

1. Strong enforcement must be the foundation for any program to lessen housing discrimination. There is no substitute for enforcement. Other activities compliment enforcement but they should not be confused and treated as an alternative. Since 1968 Kentucky has had an enforceable fair housing act containing all the powers of the national model civil rights act including powers for cease and desist, temporary restraining orders, subpeones, posting of notices, commissioner initiation of complaints, etc.

2. Damages for Embarrassment and Humiliation are essential in fair housing cases. In so many situations it is too late for the complainant to get the housing and if they cannot get damages they cannot get anything meaningful. A specific provision was added to the Kentucky Civil Rights Act in 1974 authorizing the payment or such damages. That provision was upheld by the Kentucky Supreme Court in 1982.

3. Education and cooperation between those enforcing the fair housing law and the real estate industry is highly desirable.

The Kentucky real estate industry has many educational programs for their members and the Kentucky Commission on Human Rights has participated fully in those programs.

4. Testing has been demonstrated as a most effective method of encouraging compliance with the law. Kentucky's testing program has concentrated more on apartments because funding has been limited. While testing or auditing has been used where it was preceded by an actual complaint of discrimination much more testing has been conducted to identify systemic discrimination.

5. Research and reporting has proven to be a great help in Kentucky. Nearly all the testing information has been compiled into research reports released to the public to remind everyone that housing discrimination remains as an everyday fact of life for minorities in Kentucky, even though incidents have been measureably reduced. (See appendix for five commission reports on testing.) Whenever a housing complaint is resolved through conciliation the facts of the case including the names of parties are publicly released. Damage awards are reported in the press and this is an effective deterrent. All housing discrimination hearings are public.

6. An apartment occupancy reporting rule has proven most beneficial in Kentucky. In 1975 the commission adopted a regulation requiring all owners and managers of twenty-five or more apartment units to file an annual report giving the racial composition of their units. The commission has obtained widespread support from the industry in filing these reports on July 1 each year. Pattern information without apartment names has been reported from these forms.

ANNOTATED BIBLIOGRAPHY OF COMMISSION REPORTS ON TESTING

Discriminatory Practices Determine Housing Choices in Fayette and Jefferson Counties, a report and analysis of tests in Jefferson County (Louisville) and Fayette County (Lexington) as a part of the 40-city, HUD-financed NCDH survey. Contains 25 summaries, giving the detailed experience of black and white testers, what they were told and how they were treated when they sought rentals and sales. The report found that:

Out of 280 possible categories in Jefferson County home sale tests, discriminatory practices were noted in 207, or 73.9 percent of the possible categories;

Fayette County homes sales was the next most serious, with racially discriminatory differences noted in 55.7 percent of all categories, followed by Fayette County apartment rentals with discriminatory differences noted 50.5 percent of the time and Jefferson County apartment rentals with discriminatory differences noted 46.7 percent of the time;

Apartment seeking testers in Jefferson County encountered discriminatory information on availability 86.7 percent of the time, on requirements 73.3 percent of the time, and on courtesy 70.0 percent of the time. Testers in Fayette County encountered discriminatory information on availability 76.7 percent of the time, on requirements 56.7 percent of the time, and on courtesy 63 percent of the time;

Apartment testers in Fayette County experienced discriminatory treatment in regards to different locations within units, different prices for the same units, racial remarks and the quality of units more often than testers in Jefferson County;

The report was 41 pages long and it was released in April 1978.

Apartment Discrimination Declines by Half in Fayette County, But Occurs to One Out of Four Apartment Seekers, a report and analysis of tests conducted in Lexington in 1981. The report compares the results from 1981 with those from the 1977 HUD-financed NCDH study. The report contains summaries reporting some of the discriminatory treatment encountered by black testers compared to treatment received by white testers. The report found that:

Discriminatory treatment of black apartment testers decreased by 50 percent from 1977 to 1981. Black testers seeeking apartments in Fayette County received discriminatory treatment 25.3 percent of the time in 1981 compared with 50.5 percent of the time in 1977;

Black testers encountered discriminatory treatment regarding the availability of an apartment 55.9 percent of the time in 1981 compared with 76.7 percent of the time in 1977;

Differences were noted in the quality of the apartment unit shown 33.3 percent of the time 1981 compared with 40.0 percent of the time in 1977;

Different treatment in courtesies occurred 30.1 percent of the time in 1981 compared with 63.3 percent in 1977;

Different requirements were given to black testers 26.9 percent of the time in 1981 compared with 56.7 percent of the time in 1977;

Differences were also noted in regards to location of units, prices quoted, and racial remarks in 1981 but at a much lower rate than in 1977;

The report was 15 pages long and it was released in March 1982.

Discriminatory Practices by Apartment Operators in Jefferson County Decline 50 Percent--Rate Still One in Four, a report and analysis of tests conducted in Louisville in 1980. The report compares the results from 1980 with those from the 1977 HUD-financed NCDH study. The report contains summaries reporting some of the discriminatory treatment encountered by black testers compared to treatment received by white testers. The report found that:

Discriminatory treatment of black apartment testers declined by half from 1977 to 1980 in Jefferson County. Black testers seeking apartments received discriminatory treatment 24.3 percent of the time in 1980 compared with 46.2 percent of the time in 1977;

Different treatment in courtesies occurred 49.1 percent of the time in 1980 compared with 70.0 percent in 1977;

Black testers encountered discriminatory treatment regarding the availability of an apartment 35.3 percent of the time in 1980 compared with 86.7 percent of the time in 1977;

Different requirements were given to black testers 26.7 percent of the time in 1980 compared with 73.3 percent of the time in 1977;

Different unit locations were given to black testers 25.9 percent of the time in 1980 compared with 33.3 percent of the time in 1977;

Differences were noted in the quality of the apartment unit shown 21.6 percent of the time 1980 compared with 26.7 percent of the time in 1977.

Differences were also noted in regards to prices quoted and racial remarks in 1980 but at a much lower rate than in 1977.

The report was 16 pages long and it was released in April 1982.

Apartment Discrimination Declines to 7.4 Percent in Louisville and Jefferson County, a report comparing results from black and white team testing in 1985 to results found in 1977 and 1980. The report contains summaries reporting some of the discriminatory treatment encountered by black testers compared to treatment received by white testers. The report found that:

Discriminatory treatment of black apartment testers in Jefferson County declined 39 percent in eight years (1977 to 1985). Tests conducted in 1985 revealed that blacks encountered discriminatory treatment 7.4 percent of the time, compared with 24.3 percent of the time in 1980 and 46.2 percent of the time in 1977;

Black testers encountered discriminatory treatment regarding the availability of an apartment 17.5 percent of the time in 1985 compared with 35.3 percent of the time in 1980 and with 86.7 percent of the time in 1977;

Different treatment in courtesies occurred 10.0 percent of the time in 1985 compared with 49.1 percent of the time in 1980 and 70.0 percent of the time in 1977;

Different requirements were given to black testers 9.2 percent of the time in 1985 compared with 26.7 percent of the time in 1980 and 73.3 percent of the time in 1977;

Differences were also noted in regard to unit location, quality of units, prices quoted in 1985 but at a much lower rate than in 1980 and 1977;

No racial remarks were encountered in 1985.

The report was 30 pages long and it was released in October 1985.

Apartment Discrimination in Fayette County Declines to 6.9 Percent, a report detailing results from the 1985 apartment testing program and comparing them with the results of testing in 1981 and 1977. The report contains summaries reporting incidents of discriminatory treatment encountered by black and white testers in 1985. The report found that:

Discriminatory treatment of black apartment testers in Fayette County declined 43.6 percent in eight years (1977 to 1985). Tests conducted in 1985 revealed that blacks encountered discriminatory treatment 6.9 percent of the time, compared with 25.3 percent of the time in 1981 and 50.5 percent of the time in 1977;

Black testers encountered discriminatory treatment regarding the availability of an apartment 14.3 percent of the time in 1985 compared with 55.9 percent of the time in 1981 and with 76.7 percent of the time in 1977;

Different unit locations were given to black testers 11.1 percent of the time in 1985 compared with 16.1 percent of the time in 1981 and 50.0 percent of the time in 1977;

Differences in prices were noted 9.5 percent of the time in 1985 compared with 11.8 percent in 1981 and 50.0 percent in 1977;

Different treatment in courtesies occurred 7.9 percent of the time in 1985 compared with 30.1 percent of the time in 1981 and 63.3 percent in 1977;

Different requirements were given to black testers 4.8 percent of the time in 1985 compared with 26.9 percent of the time in 1981 and 56.7 percent of the time in 1977;

No difference was noted in regard to the quality of unit in 1985 and racial remarks were noted in a single instance in 1985, much lower than in years before.

The report was 30 pages long and it was released in November 1985.

Incidents of Apartment Discrimination in Kentucky Decline to 10.5 Percent, a report comparing results from black and white team testing in 1985 to results found in 1981 in areas of the state excluding Jefferson (Louisville) and Fayette (Lexington) counties. The report contains summaries reporting some of the discriminatory treatment encountered by black testers compared to treatment received by white testers. The report found that:

Discriminatory treatment of black apartment testers in Kentucky excluding Jefferson and Fayette counties declined 13.5 percent in between 1981 and 1985. Tests conducted in 1985 revealed that blacks encountered discriminatory treatment 10.5 percent of the time, compared with 24.0 percent of the time in 1981;

Black testers encountered discriminatory treatment regarding the availability of an apartment 16.7 percent of the time in 1985 compared with 46.1 percent of the time in 1981;

Different unit locations were given to black testers 15.2 percent of the time in 1985 compared with 28.9 percent of the time in 1981;

Different requirements were given to black testers 13.0 percent of the time in 1985 compared with 23.7 percent of the time in 1981;

Differences in prices were noted 11.6 percent of the time in 1985 compared with 5.3 percent in 1981;

Different treatment in courtesies occurred 10.9 percent of the time in 1985 compared with 36.8 percent of the time in 1981;

Differences in the quality of units shown to black testers were noted 2.2 percent of the time in 1985 compared with 19.7 percent in 1981;

Racial remarks were encountered in 2.2 percent of the time in 1985 compared with 1.3 percent of the time in 1981.

The report was 37 pages long and it was released in February 1986.

tenants to rent to a member of a racial minority. Whatever the reason, the practice still exists.

It's been the NAACP's experience that the use of testing is extremely helpful in pinpointing trouble spots with regard to violation of fair housing laws. Our Nation's highest court has found testing to be valid evidence of housing discrimination.

Our local branches across the country know it's been useful in helping to verify allegations of housing discrimination as we assist persons who seek equal access to housing.

Now part of the testing, at least most of the testing, has been carried on by some 75 private fair housing groups affiliated with the National Committee Against Discrimination in Housing that's headed by the first Secretary of HUD, Dr. Robert C. Weaver.

As a matter of fact, these fair housing groups spend a large amount of their budgets to do the testing. We think that the proposed FHIP program is a welcome recognition not only of the need of testing but also of the assistance these kinds of groups can perform in trying to make equal housing access a reality.

GRAVE RESERVATIONS ON GUIDELINES

The Secretary and the administration is to be commended for strongly supporting this initiative. Although the NAACP and the Leadership Conference on Civil Rights support the initiative, we have some grave reservations with reference to the guidelines.

First, we are concerned about the fact that one group has had undue influence in helping to frame the guidelines and the people who helped to pioneer in the area of testing were systematically excluded from such consultations.

We are also concerned and skeptical about the efforts to restrict FHIP to bona fide allegations as suggested by NAR because we believe those limitations would exclude housing discrimination charges made by testers and would restrict a title VII charge to what might be terms "actual victims."

We are also concerned about efforts to prohibit contact between testers in reporting on housing discrimination because, Mr. Chairman and members of the committee, patterns, practices or other systemic conduct do not occur in isolation. This proposed restriction would cripple any effort to identify widespread discriminatory conduct and take action against such conduct if testers are forbidden to freely exchange information against such conduct and their findings prior to filing their final report.

We are conscious also of the fact that unless something is done with reference to systemic testing we are not going to get very far in terms of making fair housing a reality. The two organizations I represent today incorporate the views as set forth in the testimony of the fair housing groups represented by Mr. Tisdale, Mr. Willis, Ms. Porter, Mr. Martin, and Mr. Friedman.

We have worked very closely with these individuals and we know that they have done a yeoman job in trying to make fair housing a reality for all Americans.

We appreciate this opportunity to appear. We strongly support the fair housing initiatives program and we urge that the commit-

tee act forthrightly and that something be done about restrictions that we have lifted up in our testimony.

Thank you.

[The complete prepared statement follows:]

Senator HECHT. Thank you very much and thank you for confining your remarks to the time. I can see that you have testified many times before.

Mr. TISDALE.

Senator PROXMIRE. Mr. Chairman, could I just say a word about Mr. Tisdale?

Senator HECHT. Of course.

Senator PROXMIRE. He's one of my constituents, and we're very proud of him in Wisconsin. Mr. Tisdale is a graduate of Northern Illinois University. He's also completing an M.A. at the University of Wisconsin. He serves on the Wisconsin Real Estate Board, which gives him an understanding and constant contact with the realtors, and he's director of the Wisconsin Fair Housing Council.

He has a fine reputation, throughout the country, I am told, for his understanding and his capacity in this regard. Thank you.

Senator HECHT. With that endorsement, we eagerly await your testimony.

STATEMENT OF WILLIAM TISDALE, EXECUTIVE DIRECTOR, METROPOLITAN MILWAUKEE FAIR HOUSING COUNCIL

Mr. TISDALE. Thank you, Mr. Chairman. Thank you, Mr. Proxmire.

On behalf of the members of the Mid-America Fair Housing Alliance which is made up of private fair housing organizations located in Wisconsin, Illinois, Ohio, Indiana, and Michigan, I would like to make brief comments regarding the proposed guidelines for testing under the Fair Housing Initiatives Program.

We support the funding of private fair housing enforcement organizations through direct Federal funding. We acknowledge the need for guidelines to assist in the implementation of program objectives.

It is our believe, however, that the guidelines proposed by the Department of Housing and Urban Development and the National Association of Realtors contain requirements that would impose new limitations on testing and make fair housing enforcement more difficult rather than more effective.

CLEAR RETREAT OF VALID TESTING

Provisions within these guidelines represent not only a limitation on enforcement of fair housing laws, but a clear retreat from the definition of objective and valid testing as defined by courts in this system, including the U.S. Supreme Court.

The proposed guidelines impede effective enforcement efforts by: First, requiring that two tests be conducted when the complaint involves a bona fide homeseeker. This procedure cannot be utilized uniformly since frequently the unit in question may be rented prior to the completion of a second test. And depending on the specific circumstances of the complaint under investigation, it may not be possible to send more than, in some cases, one white tester to duplicate the minority homeseeker's request for the unit rented. Those circumstances involve tight rental markets, infrequent minority inquiries, suspicious housing providers, and telephone discrimination prior to the negotiation.

In some cases, we've had in Sussex, WI, for example, Senator Proxmire, every black homeseeker who comes to a real estate office is expected and determined to be a tester whether they are or not. There just aren't minorities looking in those areas. So when a minority homeseeker comes, that person is considered to be a tester, let alone an additional person matched identically, and let alone a white person matched identically to those two people. So you might as well wear a badge and say, "I'm a tester." And that's what this requirement would provide in most cases.

Second, by requiring that each tester see the same agent involving the home purchase, this may signal to the agent that a test is being conducted allowing the agent to amend behavior before being found out. Courts have uniformly ruled that principals—brokers in charge of real estate offices—are responsible for the conduct of their agents in providing equal services to all customers.

The proposed restriction in these guidelines seems to be an effort to make it difficult to detect discriminatory conduct by any agent and thus free the principal broker from that responsibility.

Third, requiring that testers utilize characteristics equivalent to the person making the bona fide allegation, in cases where paired testers have been used courts have determined that testers need not mirror the exact characteristics of the complainant. Courts have recognized as valid testing situations in which testers match each other except for that factor that they're testing. So in the case where you're isolating race discrimination, it is not necessary to match the victim on every characteristic but only to determine whether or not that home provider is discriminating based on race—are they denying minorities; are they denying women; are they denying handicapped individuals, in the case of Wisconsin State law coverage?

And that is what the determining factor should be, isolating that factor which is discriminatory and illegal, not determining that you have to identify individual identical on every characteristic so as to tip off the homeseeker who is being investigative.

Fourth, by requiring that testing be conducted only after a bona fide allegation has been received. Due to the subtle nature of discrimination, parts of the housing market where the reputation for discrimination is so great that few minority homeseekers apply, as I stated earlier, or are fearful of challenging discriminatory practices—very few people want to be pioneers and be discriminated against—actual or potential acts of discrimination go unreported.

In these instances, systemic testing is the only method to break down barriers of housing discrimination and in fact a recent study entitled "HUD Conference on Fair Housing Testing" by Kathleen Heinz stated that:

> Systemic testing programs appear to provide the single most effective means available to discourage discrimination and enforce fair housing laws.

These FHIP guidelines would do away with that.

In a letter dated May 9, 1986, Clark E. Wallace, president of the National Association of Realtors, stated:

> We would hope and expect that these guidelines, if enacted into law, would impact not only FHIP-funded testing programs but would also become the measure of fairness and objectivity by which courts and enforcement agencies measure all real estate testing.

COURTS HAVE ALREADY DETERMINED DISCRIMINATION

My concern there is courts have already determined what is fair and objective. Courts have already determined that fair housing testing is a valid means of identifying housing discrimination and discriminatory practices. What else are we looking for aside from the court decisions? And if this is the case, it is being inferred that there is something going on that is not quite right in the testing procedure and my question to that is, where are the bodies? Where are all of these frivolous lawsuits that have been filed or cases that have been reversed due to inadequate testing information?

It is clear that the National Association of Realtors is intent not only on restricting but rolling back gains made through qualitative and effective testing programs currently providing the bulk of case law in the area of fair housing litigation.

Senator HECHT. Excuse me. Please try and summarize now. Your time is up. Go ahead and summarize. I'm not cutting you off.

Mr. TISDALE. I'm finished. In conclusion, courts have historically determined the standards by which eligible testing evidence is secured. The members of the Mid-America Fair Housing Alliance support the Fair Housing Initiatives Program and the inclusion of reasonable guidelines to be incorporated into administrative rules. It is our position, however, that no guidelines on testing become part of any legislation.

Thank you.

[The complete prepared statement follows:]

WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1025 VERMONT AVENUE, N.W. · SUITE 820 · WASHINGTON, D.C. 20005
(202) 638-2269

TESTIMONY

OF

ALTHEA T. L. SIMMONS

DIRECTOR, WASHINGTON BUREAU

OF THE

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

BEFORE THE

SUBCOMMITTEE ON HOUSING AND URBAN AFFAIRS

SENATE COMMITTEE ON BANKING,

HOUSING AND URBAN AFFAIRS

JUNE 18, 1986

ON

FAIR HOUSING INITIATIVES PROGRAM

Room 538 DSOB

Mr. Chairman, and members of the Subcommittee, I am Althea T. L. Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored People. The NAACP, now in its 77th year, is the nation's oldest and largest civil rights association with 2100 units in all 50 states and the District of Columbia.

Today, I speak on behalf of the NAACP and the Leadership Conference on Civil Rights, a coalition of more than 170 labor, religious, fraternal and civil rights groups. Both organizations are headed by Benjamin L. Hooks.

The National Association for the Advancement of Colored People and the Leadership Conference on Civil Rights support the Administration's Fair Housing Initiatives Program (FHIP).

Our nation has not as yet lived up to its promise set forth in Title VIII of the Civil Rights Act of 1968 some 18 years ago. The passage of Title VIII was a forward-looking bi-partisan first step to begin the process of ending the degrading system of housing apartheid in America.

My predecessor, Clarence M. Mitchell, Jr., launched an indefatigable campaign to secure Congressional action on the 1968 Housing Act to establish a national housing policy. We thought that flesh could be added to the skeleton law during the succeeding Congress. That did not happen in 1969 and it has not happened. Blacks and other minorities are still discriminated against in the nation's housing market. In some instances, the discrimination occurs when a prospective homeowner fails to secure an adequate loan commitment unless the would-be homeowner elects to stay within his/her "racial neighborhood". In other cases, the discrimination often occurs when an apartment manager unilaterally decides that it is not in the best interests of the owners and/or tenants to rent to a member of a racial minority. Whatever the reason, the practice still exists in 1986.

It has been the NAACP's experience that the use of "testing" is extremely helpful in pinpointing "trouble spots" with regards to violations of fair housing laws. Our nation's highest court has found testing to be valid evidence of housing discrimination. The NAACP's local branches and other units know it to be useful in verifying allegations of housing discrimination as we assist persons who seek equal access to housing.

Most of the testing has been carried on by the more than 75 private fair housing groups affiliated with the National Committee Against Discrimination in Housing, headed by Dr. Robert C. Weaver, the first Secretary of the U. S. Department of Housing and Urban Development. It should be noted that these private fair housing groups have expended an inordinate amount of their scarce resources in testing; therefore the Private Enforcement Initiative of the Fair Housing Initiatives Program is seen as a welcome recognition not only of the need for testing but also of the assistance that groups such as those represented here today can give to make equal housing access a reality. Secretary Pierce and the Administration are to be commended for providing strong support for the private enforcement initiative being considered by the Congress.

Although the two organizations I represent support testing, I must point out to the Subcommittee that we have a problem with portions of the Senate bill and most specifically to the "Guidelines for the Funding of Testing Under the Private Enforcement Initiative of the Fair Housing Initiatives Program (FHIP). The guidelines in question were drafted and "adopted" by the Department of Housing and Urban Development and the National Association of Realtors (NAR) without consultation or input from groups, such as those represented here today, who pioneered in the use of "testing" and who have

knowledge of what is occurring in many communities in this nation. Representatives of some of those groups will testify later this morning.

The NAACP and the Leadership Conference on Civil Rights have reservations about the provision of the Guidelines which state that there must be "an allegation of a discriminatory housing practice made by a person not employed or affiliated with the organization conducting the test." This provision would effectively prevent "systemic" testing.

We are skeptical of efforts to restrict FHIP (and the Fair Housing Act itself) to "bona fide allegations" as suggested by the National Association of Relators (NAR). Such a limitation would exclude housing discrimination charges made by testers and would restrict a Title VIII charge to what may be termed "actual victims".

We are skeptical of efforts to prohibit contact between testers in reporting on housing discrimination. Mr. Chairman, and members of the Subcommittee, patterns, practices, or other systemic conduct do not occur in isolation. This proposed restriction would cripple any effort to identify widespread discriminatory conduct and take action against such conduct if testers are forbidden to freely exchange information about their findings prior to the preparation and filing of a formal report. Lastly, Mr. Chairman, we are extremely skeptical of the "undue" influence a single group - in this instance, the National Association of Realtors (NAR) has had in framing FHIP's statutory authorization or its administrative guidelines.

Mr. Chairman, and members of the Subcommittee, we are conscious of time constraints; therefore, with your indulgence, I will call on my colleagues, with their specialized expertise in the testing area, to detail some of their concerns and experiences for the benefit of the Subcommittee.

They are William Teasdale of Milwaukee, Lee Porter of New Jersey, Kent Willis of Richmond--all representing fair housing groups; Galen Martin, the past President of the International Association of Official Human Rights Agencies and the Director of the Kentucky Human Rights Commission; Avery Friedman, a prominent fair housing litigator from Ohio and Martin Sloane, Executive Vice President of the National Committee Against Discrimination in Housing.

We also request, Mr. Chairman, that the record be left open for a 10 day period to allow us an opportunity to provide the Subcommittee with additional information which we believe will be helpful to it as it considers this issue.

In conclusion, the NAACP and the Leadership Conference on Civil Rights supports the Fair Housing Initiatives Program as a significant step forward and urges swift action thereon.

Thank you for this opportunity to express the views of the National Association for the Advancement of Colored People and the Leadership Conference on Civil Rights.

METROPOLITAN MILWAUKEE FAIR HOUSING COUNCIL

William R. Tisdale, Executive Director

TESTIMONY BEFORE THE SENATE SUBCOMMITTEE

ON HOUSING AND URBAN AFFAIRS

JUNE 18, 1986

WILLIAM R. TISDALE, EXECUTIVE DIRECTOR,
METROPOLITAN MILWAUKEE FAIR HOUSING COUNCIL

On behalf of the members of the Mid-America Fair Housing Alliance, which is made up of private fair housing organizations located in Wisconsin, Illinois, Ohio, Indiana, and Michigan, I would like to make brief comments regarding the proposed "Guidelines for Testing under the Fair Housing Initiatives Program"(F.H.I.P.).

We support the funding of private fair housing enforcement organizations through direct federal funding. We also acknowledge the need for guidelines to assist in the implementation of program objectives. It is our belief, however, that the guidelines proposed by the Department of Housing and Urban Development (H.U.D.) and the National Association of Realtors (N.A.R.) contain requirements that would impose new limitations on testing and make fair housing enforcement more difficult rather than more effective.

Provisions within these guidelines represent not only a limitation on the enforcement of fair housing laws, but a clear retreat from the definition of objective and valid testing as determined by courts in this system, including the United States Supreme Court.

The proposed testing guidelines impede effective enforcement efforts by:

1) Requiring that two (2) tests be conducted when the complaint involves a bona fide homeseeker. This procedure cannot be utilized uniformly, since frequently the unit in question may be rented prior to the completion of a second test. And, depending on the specific circumstances of the complaint under investigation, it may not be possible to send more than one (1) white tester to duplicate the minority homeseeker's request before the unit is rented (e.g. in tight rental markets, infrequent minority inquiries, suspicious housing providers, telephone discrimination prior to negotiation). Courts have uniformly accepted testing methods, other than those proposed in these guidelines, as sufficient for a finding of violation of fair housing law. To require a second test, when sufficient evidence is already in hand, is unnecessary, and unfair to the bona fide homeseeker, risks revealing that a test is being conducted and, in effect, requires that an owner or agent discriminate twice before being brought to account.

2) By requiring that each tester see the same agent in tests involving the purchase of a home. This may signal to the agent that a test is being conducted, allowing an agent to amend behavior to avoid getting caught. Courts have uniformly ruled that principals, brokers in charge of real estate offices, are responsible for the conduct of their agents, and for providing equal services to all customers. The proposed restriction in these guidelines seems to be an effort to make it difficult to detect discriminatory conduct by any agent.

1845 North Farwell Avenue Suite 310E, Milwaukee, WI 53202 (414) 272-5232

ADDITIONAL INFORMATION FOR SENATOR PROXMIRE FROM WILLIAM TISDALE

USE OF MATCHED PAIRS A PREREQUISITE FOR TESTS

In 1982 a black woman attempted to rent a unit in an apartment building in Milwaukee for two (2) consecutive months. Each time she responded to an ad in the newpaper, but was told by the manager that the unit had already been rented. Finally, she filed a complaint with the Metropolitan Milwaukee Fair Housing Council (MMFHC). The woman was advised by the MMFHC to return to the apartment building one more time to negotiate for the apartment. Per the test strategy, the black woman returned to the building and was once more told by the manager that the unit was unavailable, as she had an accepted application for it. Five (5) minutes later a white female arrived a the building and spoke to the same manager, who showed her an available unit, encouraged her to apply and ultimately offered the white woman the apartment.

This test was utilized in legal action, which resulted in the woman obtaining the rental of the apartment, as well as a jury award of $7,500.00 in damages.

This type of testing is not allowable under FHIP guidelines.

WHO CAN FILE A COMPLAINT

As part of an investigation of a sex discrimination complaint, the MMFHC sent testers to a large apartment complex in Brookfield, Wisconsin. One tester reported that due to several comments made by the rental agent and the noticeable lack of any minority tenants, he suspected that racial discrimination was operative at this building. Based on his observations, the Fair Housing Council conducted a series of five (5) tests for racial discrimination, which demonstrated a clear pattern of differential treatment accorded to black and white homeseekers.

After the results of this study were made public, one interracial couple called the Fair Housing Council and indicated that they sought to rent an apartment at that same complex during the time that testing had been conducted. They had been denied an opportunity to rent there, but did not know at that time that they had been lied to.

The interracial couple filed a lawsuit in federal court, using the five (5) systemic tests as substantiating evidence. In 1982, a jury awarded them $35,000.00 in damages and that complex now rents to minority persons.

None of this would have been accomplished if the Fair Housing Council used the FHIP guidelines for the initiation of systemic testing.

IN-PERSON VISITS

In 1983, a black man responded to an advertisement in the paper for a unit for rent in Milwaukee. There was no address stated in the ad, only a telephone number. Upon calling that number, the black man was asked by the owner, "Are you a black man or a white man?" The black man answered that he was black. The response was, "I'm sorry. This is an all-white building.

You understand, don't you?"

The Fair Housing Council conducted a series of telephone tests, utilizing matched pairs of black and white testers. Each time, the testers were asked their race, and each time black testers were told they could not be rented to and white testers were allowed to make appointments to view the unit.

This test was used in a subsequent trial in State Court, in which the victim was awarded $3,000.00.

This type of testing is not allowable under FHIP guidelines. Yet, due to the fact that the address was not printed, nor was it provided to callers identified as black, it was not possible to perform in-person testing.

Senator HECHT. Thank you very much.

Mr. Willis.

STATEMENT OF KENT WILLIS, EXECUTIVE DIRECTOR, HOUSING OPPORTUNITIES MADE EQUAL

Mr. WILLIS. Good morning. My name is Kent Willis and I am the executive director of Housing Opportunities Made Equal, which is a private fair housing organization located in Richmond, VA.

I am a tester. I started my fair housing career as a tester about 8 years ago. I have done a large number of tests. I have designed testing programs. I have also been a tester-plaintiff in a court case.

ISSUE OF ALLEGATION OF DISCRIMINATION BEFORE A TEST

I probably will have the briefest remarks of all because I only want to look at one issue and that is the fact that under the guidelines an allegation of discrimination has to take place before you can test.

HOME has tested and taken many cases to court based on tests over the last 10-years. During that period we also attempted to work closely with the board of realtors to train them, to make them more aware of the housing discrimination problems that existed. Despite the numerous successful court cases we had, we still did not gain access to the Richmond Board of Realtors.

Ten years after we began our testing program we decided to do some systemic testing. We conducted 100 random tests of real estate brokerage firms in the Richmond area. The results showed that there was widespread discrimination in Richmond.

We took the results of that study to the Richmond Board of Realtors and since then our relationship has changed considerably: One, we are now discussing a testing program in Richmond that would be funded by the board of realtors themselves. Two, we are training new real estate agents. That is, no new member of the board of realtors practices in Richmond without being trained by Housing Opportunities Made Equal in fair housing practices.

My point is that testing for court cases is extremely important but systemic testing is equally important and I think that if that's not part of these guidelines then the FHIP Program will be considerably weakened.

Thank you.

Senator HECHT. Thank you very much.

Ms. Porter.

STATEMENT OF LEE PORTER, DIRECTOR, FAIR HOUSING COUNCIL, BERGEN COUNTY, NJ

Ms. PORTER. I am Lee Porter, executive director of the Fair Housing Council in northern New Jersey. I have been in the business of equal opportunity in housing for 20 years or more.

Since I am last, I will be brief and avoid repetition.

To make a long story short, Mr. Proxmire and Mr. Hecht, you asked the major question, "Should these guidelines be enacted into law?" And the answer is unequivocably no.

We feel that testing is sort of like the Bureau of Weights and Measures. If an investigator comes into your store and puts a 1-pound weight on the scale and the scale measures a half a pound, it means that the consumers are being cheated. In this instance, it's the black people and other minorities who are being discriminated against and cheated in the real estate housing marketplace.

We also feel that we should be able to do the random testing which discerns the patterns of discrimination. The second test we feel is the multiple testing in order to discern patterns of discrimination and to bring about a case is tantamount to a bank robber

having to rob the same bank twice, not only rob the same bank but the same branch with the same tellers, in order to be convicted.

I agree, Mr. Proxmire and Mr. Hecht, with everything that my colleagues have said and once again these guidelines do not belong in the statute, and I would like to take questions from you.

[The complete prepared statement follows:]

Senator HECHT. Thank you very much. I enjoyed your remarks.

Senator Proxmire, you wanted to ask some questions. Do you want to start off and then I'll ask some and then come back for a second round?

Senator PROXMIRE. All right. First, I'd like to ask, Mr. Tisdale, Mr. North who will testify a little later, of the National Association of Realtors, states that the guidelines are fair, objective, and valid.

How would you characterize them?

UNFAIR, INVALID, AND NOT OBJECTIVE

Mr. TISDALE. Unfair, not valid, and not objective.

Senator PROXMIRE. Would you elaborate on that?

Mr. TISDALE. For all of the reasons that I mentioned, Senator Proxmire. There is very little objectivity in the design of these guidelines when in fact it requires more than sufficient evidence in order to have sufficient information to declare probable cause finding for housing discrimination occurring.

There are many efforts by private fair housing groups that would be eliminated if not greatly restricted by implementation of these guidelines. Specifically, as I mentioned before, it is very important in the systemic area that individuals be allowed to test housing markets without having a complaint first being filed. Specifically, some of the suburban communities in Wisconsin, for example, are not accessible to minorities, either perceptionwise or in reality, and when a minority homeseeker goes to a sales office or goes to a rental complex, at that point they are turned off immediately. And it may be courteously. It may be politely. Discrimination is occurring. Those are unreported. And without systemic testing, there is no way to get at that kind of discrimination. I think that is what these guidelines miss.

The number of complaints coming in represent maybe a tenth or a twentieth of all housing discrimination that's occurring. All of the other housing discrimination that's occurring subtly, sophisticatedly, is going undetected. And that's what systemic testing will get at.

Senator PROXMIRE. Mr. Willis, Mr. North on page 4 of his testimony defends the Realtor-HUD guidelines that bar testers from bringing complaints under the initiatives program. He says, "There are other avenues testers can take with their complaints." In addition, "The tester and testing agency have those rights of action guaranteed them under the Supreme Court decision in *Havens* v. *Coleman.*"

As one who's very familiar with the *Havens* case, would you briefly tell us how the initiatives guidelines if they would have been in effect would have prohibited your agency from bringing the action?

Mr. WILLIS. Under the *Havens* case?

Senator PROXMIRE. Yes.

Mr. WILLIS. If my understanding of the guidelines is correct, the testing that we did that brought the *Havens* case would not have met the HUD guidelines.

Senator PROXMIRE. I'm sorry. I missed that.

Mr. WILLIS. The testing that we did to bring the *Havens* case would not have met the HUD guidelines according to the FHIP program.

Senator PROXMIRE. It would not have met the guidelines?

Mr. WILLIS. It would not have met the guidelines.

Senator PROXMIRE. Ms. Porter, do you believe that these guidelines will adversely affect your enforcement efforts, particularly in light of your use of the New Jersey State Fair Housing Law?

Ms. PORTER. Yes. The courts do not require multiple tests before determining discrimination. Testers do not have to see the same salesperson. Keep in mind, Mr. Proxmire, that the State of New Jersey had a fair housing law before the Government had enacted a Fair Housing Act. If this program, the FHIP Program, is solely limited—the funding is limited to this particular program, it's a private program; it's an esoteric program; it's a new initiative; and is not supposed to extend into any other program; it is not supposed to interfere with the private initiatives in the Federal court, I think we might be able to work out something in the rules and regulations with these guidelines.

But according to the NAR statements, NAR intends for these guidelines to be the guidelines for all testing in all cases in all legal procedures. And this is of greatest concern to the private practioners of fair housing.

Senator PROXMIRE. Thank you very much. One other question for Mr. Tisdale.

Mr. Tisdale, would you say that HUD in secretly forging agreements with a private trade organization on guidelines for fair housing testing has seriously compromised the process of public rulemaking?

It seems to me that the guidelines prescribe specific and important rules before any real public views have been received.

Mr. TISDALE. I believe so, Senator Proxmire, in that the guidelines offer a boundary, now HUD is committed to working within these per their agreement with NAR prior to any further elaboration or consideration or what the deficiencies in these guidelines may pose.

So even if we present—it was presented to representatives in a meeting on May 9 I believe it was, that these were the guidelines and they were just pretty much going to stay as they are now, so take it or leave it, was the attitude. And in doing that, the guidelines are bordering any further negotiation as far as change in a significant manner. That's my opinion.

Senator PROXMIRE. Thank you very much, Mr. Tisdale.

Thank you, Mr. Chairman.

Senator HECHT. Thank you. Anyone who might want to answer, do you find the FHIP guidelines suitable on which to base regulations governing testing?

Ms. PORTER. Other than testing? Repeat the question, please.

Senator HECHT. Sure. Do you find the FHIP guidelines suitable on which to base regulations governing testing?

Ms. PORTER. No; I wish I could write the guidelines. Keep in mind that the Fair Housing Council in northern New Jersey has had landmark decisions. We've been in court a good 20 to 25 years and you don't need these extensive guidelines. It's very simple.

and thus free the principal broker from responsibility.

3) Requiring that testers utilize characteristics equivalent to the person making the bona fide allegation. In cases where paired testers have been used, courts have determined that testers need not mirror the exact characteristics of the complainant. Courts have recognized as valid testing situations in which testers match each other except for that factor (e.g. race, sex, etc.) which is being alleged as the violation. Having this type of flexibility, being able to vary the testers' characteristics from the complainant's becomes particularly important in situations where the housing provider may be suspicious of an ensuing investigation and/or when the complainant has unique or unusual characteristics (e.g. a couple, one spouse Hispanic the other spouse Korean). To replicate such unusual situations would surely tip-off a housing provider and thwart the ability to uncover illegal housing practices.

4) Requiring that testing be conducted only after a bona fide allegation has been received. Due to the subtle nature of discrimination, parts of the housing market where the reputation for discrimination is so great that few minority homeseekers apply, or are fearful of challenging discriminatory practices, actual or potential acts of discrimination go unreported. In these instances, systemic testing is the only method to break down barriers of housing discrimination. A recent study entitled, "H.U.D. Conference on Fair Housing Testing" by Kathleen G. Heintz stated that ... systemic testing programs appear to provide the single most effective means available to discourage discrimination and enforce fair housing laws.

In a letter dated May 9, 1986, Clark E. Wallace, President of the National Association of Realtors, stated "We would hope and expect that these Guidelines, if enacted into law, would impact not only F.H.I.P. funded testing programs but would also become the measure of fairness and objectivity by which courts and enforcement agencies measure all real estate testing". It is clear that the National Association of Realtors is intent on not only restricting, but rolling back gains made through qualitative and effective testing programs currently providing the bulk of case law in the area of fair housing litigation.

In conclusion, courts have historically determined the standards by which eligible testing evidence is secured. The members of the Mid-America Fair Housing Alliance support the Fair Housing Initiatives Program and the inclusion of reasonable guidelines to be incorporated into administrative rules. It is our position, however, that no guidelines on testing become part of any legislation.

TESTIMONY BEFORE THE

UNITED STATES SENATE

SUB-COMMITTEE ON HOUSING AND URBAN AFFAIRS

THE FAIR HOUSING INITIATIVES PROGRAM of the U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

June 18, 1986

BY

LEE PORTER

EXECUTIVE DIRECTOR
FAIR HOUSING COUNCIL OF NORTHERN NEW JERSEY

Mr. Chairman, members of the sub-committee, I am Lee Porter, Executive Director of the Fair Housing Council of Northern New Jersey, a 25 year old organization considered to be one of the best private Fair Housing Councils in the nation. I would like to thank you and your committee for your invitation to testify in regard to the agreement between the U.S. Department of Housing and Urban Development and the National Association of Realtors on the administration's proposal for the Fair Housing Initiatives Program.

The promise of fairness and equality in the housing marketplace remains an unkept promise for Blacks and other minorities in America today and we applaud and commend Samuel R. Pierce, Secretary of HUD for his efforts to begin to address the issue of Fair Housing enforcement and attempt to make that promise a reality through the administration's Fair Housing Initiatives Program.

Practitioners in the field of Fair Housing enforcement support the Administration's Initiatives Program, but we strongly object to the inclusion of the Guidelines in the statute.

Neither the Department of HUD nor the National Association of Realtors are considered practitioners of Fair Housing enforcement, yet these Guidelines were promulgated without consultation with groups which have longivity, expertise, and, by the government's own admission, the best track record

in the field of Fair Housing enforcement.

The Guidelines prepared by NAR and HUD contain requirements that would impose new limitations in testing and make fair housing enforcement more difficult rather than more effective.

To the extent that proposed guidelines assure objectivity and probative value of evidence obtained, then reflect the current practices of private fair housing agencies. However, three of the proposed guidelines represent a clear retreat from, and limitation on, fair housing law as it has been developed by the courts.

1. SECOND TEST DESIGNED TO GIVE DISCRIMINATORS A SECOND CHANCE. This is tantamount to requiring that a criminal commit the same crime twice against the same person before he/she can be convicted for a crime. The guidelines require that two tests be conducted when the complaint involves a bonafide homeseeker. Most private fair housing agencies send a white tester to duplicate the minority homeseeker's request. When the white tester receives substantially more favorable treatment (offered the housing unit, or quated better terms and conditions) most agencies proceed directly to file suit on the minority applicant's behalf. Courts have uniformly accepted this simple test as sufficent for a finding of violation of fair housing law. To require a second test, when sufficient evidence is already in hand, is unnecessary, and unfair to the bona fide homeseeker, risks revealing that a test is being conducted and, in effect, requires that an owner or

agent discriminate twice before being brought to account.

2. REQUIREMENTS DESIGNED TO UNDERMINE INVESTIGATIONS. In most real estate markets each office has numerous agents who rotate their responses to customers. The guidelines require that each tester see the same agent in tests involving the puchase of a home. This may signal to the agent that a test is being conducted, allowing an agent to amend behavior to avoid getting caught. Courts have uniformly ruled that principals, broker in charge of real estate offices, are responsible for the conduct of their agents, and for providing equal services to all customers. The proposed restriction in these guidelines seems to be an effort to make it difficult to detect discriminatory conduct by any agent, and thus free the principal broker from responsibility.

3. EFFORT TO RESTRICT INVESTIGATION OF A CLOSED COMMUNITY. The HUD-NAR Guidelines require that testing be conducted only after a "bonafide allegation"(sic.) against a specific individual or firm from someone not connected with the testing agency has been received. This requirement has the effect of exempting from enforcement those parts of the housing market where the reputation for discrimination is so great that few minority homeseekers apply, and where few local organizations or individuals wish to challenge the discriminatory patterns. One virtue of the Havens decision was that it allowed private fair housing agencies to take the initiative for fair housing enforcement in those most difficult areas.

This requirement would in effect repeal that right so far as this program is concerned.

Two general issues are of great concern:

First, there is a danger, already trumpeted as a hope by NAR, that these guidelines proposed for FHIP may be extended to all fair housing enforcement. This outcome would effectively repeal substantial parts of the federal fair housing law and its effect on the national policy to achieve fair housing would be disastrous.

Second, highly specific guidelines written into legislation ignore the variations in market practices over time and in different locations. Guidelines can be written so as to assure objectivity and probative value without this degree of specificity and are more appropriate in the regulatory process than in legislation.

SUMMARY

Private fair housing agencies strongly support a Fair Housing Initiatives Program in which reasonable guidelines would be established through the regulatory process, as a major step forward to strengthen fair housing enforcement.

We oppose the NAR-HUD guidelines, now a part of the Senate bill, as a retreat from the present law, and a protection for those who would discriminate in violation of the law.

Although it contains one requirement we consider limiting and unwise we do not oppose the House version of the bill.

Mr. Chairman, we thank you and your committee for your consideration of this very important project.

When a black has been denied the housing and the white has been accepted, you don't need extensive guidelines with multiple tests. The courts have awarded housing and damage awards on the basis of the black denied, the white accepted.

These guidelines do not belong in the statute. HUD was expected to write regulations later where ambiguities would be addressed. It is our understanding that these guidelines would apply to FHIP and nothing else. HUD might decide next year that we're going to do a different kind of testing. We might be doing another program and HUD then might have to write different guidelines for the next program.

We had guidelines for the housing market practice survey [HMPS], which was the national testing program. Those guidelines were not identical to what we have here.

Senator HECHT. Mr. Willis I think wanted to say something while you were talking.

Mr. WILLIS. How could you tell? [Laughter.]

COURTS HAVE SHAPED AND REFINED TESTING

I just wanted to reiterate what Mr. Martin and Mr. Friedman said earlier I think in slightly different terms. What has happened with testing I think is over the last 15 years the courts have shaped and refined what testing is. They have sent this message out through case after case to the fair housing groups and the fair housing groups have taken it and made it "more scientific," as Mr. Martin says.

And I think this is the way to look at it: What the private fair housing groups have created are highly refined testing techniques that are approved by the Federal courts all across the country. However, these techniques are not highly restricted. In other words, testing needs broad controls but not restrictions on exactly how you do each test. And I think those are the kind of guidelines that we need. Thank you.

Senator HECHT. Mr. Tisdale.

Mr. TISDALE. Very briefly, Mr. Hecht, these guidelines lock in testing procedures. There is not one way to sell a house. There is not one way to market a unit. These would lock us into one way of conducting investigations and testing. And I think that's where the unfairness, the subjectiveness, and the invalidity of these proposed guidelines come in. These lock us into doing it one way and as the rental market changes, as the housing or sales market changes, we need to be able to be flexible and be able to adapt to those changes.

These guidelines specifically and even a greater instance if they were enacted into statute would lock us into one way of ascertaining whether or not illegal discrimination has occurred, and that's where the real crime is.

Senator HECHT. Ms. Simmons, we don't want to leave you out.

Ms. SIMMONS. No, Mr. Chairman. In the Nation's Capital, we have a habit of institutionalizing everything. It occurs to me that if this goes into the statute, bits and pieces will find its way into other places. We are strongly opposed to these guidelines being locked into the statute. We are really opposed to several sections of the guidelines and we don't think that HUD should actually con-

fine itself to this agreement because we think it will do severe damage to what we already have.

And I think that HUD should be concerned with trying to do what it can to ensure that there's equal access to housing and I think these guidelines will not do that.

Senator HECHT. Let me ask the next question and I'll let you answer first. You'll like this one.

How would you change the guidelines to better ensure the practice of fair housing?

Ms. SIMMONS. The first thing I would do would be to get with my friends who have had this extensive experience and help to work out some—take into consideration court decisions and help to work out some broad-based guidelines that will not hamper the equal access to housing.

Senator HECHT. Mr. Tisdale.

Mr. TISDALE. I think we basically need to be concerned with how the tests are structured, how the investigators or testers are recruited and trained, and the quality of the analysis prior to coming up with the decision on the testing evidence. I think that's where we need to be concerned in the area of testing—the structure, the training and recruitment, and the analysis. I think that's what guidelines in this case need to focus in on, rather than how to, devised by two entities, NAR and HUD, who have, in my estimation, not done any testing on their own, have very limited information as far as conducting tests, coordinating tests, or analyzing test results as a Department. That is usually subcontracted out to someone else.

Senator HECHT. Mr. Willis.

Mr. WILLIS. I would like just to add briefly to Mr. Tisdale's remarks.

TRAINING OF TESTERS

I think that the way the guidelines exist now is as if they were written so that testers would have to wear a badge when they went out that says, "I'm a tester." We actually have these that we give to people when we are training them. We don't expect them to wear them after that time.

The point is that testing as a technique, which has developed as we've indicated over the years, needs to be more refined. It needs to be more sophisticated. This is the part that needs to be worked on: How you train, recruit, and direct your test, not what an individual test looks like. Thank you.

Senator HECHT. Thank you.

Ms. Porter.

Ms. PORTER. Mr. Hecht, I think that we have to state that our testers are trained by lawyers to be impartial and they gather information and they are objective. The main items I would change would be:

First, pay for random testing.

Second, the acceptance of an allegation of discrimination from members of the protected class, tester, and nontester.

Third, eliminate multiple visits and multiple test requirements to the same sales person in the same office. You have to realize

that testing differs from one part of the country to another, so it's hard to lock in one set of guidelines to apply to the entire Nation. In some areas there's a vacancy rate of maybe 10 or 15 percent. In the New York-New Jersey-Connecticut area, the vacancy rate is very, very low. So the guidelines would have to reflect less stringent requirements for allegations of complaints and multiple tests.

The courts are very, very astute. Those Federal judges in New Jersey are very smart in determining discrimination in housing, so that we do not need the multiple tests before we discern patterns of discrimination. One test really in most cases is enough.

In instances where we feel that maybe one case isn't enough, we sometimes send out two or three different testers. But we should not be required to send out two or three different testers for every case.

Senator HECHT. Thank you very much.

Senator Proxmire, do you have any further questions?

Senator PROXMIRE. No. I'd just like to say I think this is an excellent panel and I've been very impressed with its testimony and it's very helpful.

Senator HECHT. Likewise, the way they answer questions right off the top of their head, they're very, very informed. Thank you very much.

Now we will go on to the last witness, Mr. William North.

Mr. North, if you were not here earlier, I will ask you to try and hold your remarks to 5 minutes. At that time I won't cut you off, but I will ask you to summarize.

STATEMENT OF WILLIAM D. NORTH, EXECUTIVE VICE PRESIDENT, NATIONAL ASSOCIATION OF REALTORS

Mr. NORTH. I would be pleased to do so. I am William D. North, executive vice president of the National Association of Realtors.

On behalf of the 700,000 members of the national association, we greatly appreciate this opportunity to appear and testify before this subcommittee on what we believe to be a very significant opportunity for the resolution—the ultimate resolution of the problem of housing discrimination.

The private enforcement initiative of the Fair Housing Initiatives Program now pending before the Congress contains a set of guidelines which are designed to ensure that objective, reliable, and controlled testing will receive Federal funding, and we urge very strongly that this subcommittee adopt the Fair Housing Initiatives Program with the guidelines as drafted.

CERTAIN MISUNDERSTANDINGS

I have had the opportunity this morning of hearing in the other panels various interpretations of these guidelines and I suggest to you that at the risk of or as an alternative to reciting the testimony that is contained already in my statement, I would like to attempt to correct certain misunderstandings which appear to have arisen.

No. 1, the guidelines are limited to the FHIP Program. They are not intended, as Mr. Knapp indicated, to apply to other programs

that are funded by HUD or are funded by private fair housing organizations. This is limited to FHIP.

No. 2, there is a suggestion that somehow the guidelines require three, four, six visits, by paired testers. I think it is very clear from the language in 602 that only one visit from a paired tester is required. More can be made if that seems to be desired, but that is not required by these guidelines.

Third, there is a suggestion that this abolishes systemic testing and that simply is not the case. Systemic testing is appropriate if we understand correctly that systemic testing is testing without a bona fide home purchaser involved. Systemic testing is guaranteed under these guidelines as an opportunity, but what we have attempted to do in these guidelines is to provide a control group by which the discrimination, if it exists, can be measured. And I think it is generally the case, recognized among testers, that a control group is indispensible to a scientific approach to testing.

There is a suggestion also that there is somehow a lock-in, that these guidelines are so rigid and so narrow that HUD will be forevermore or at least in the foreseeable future restricted in the manner in which testing can be conducted or they can regulate testing. I suggest to you that all these guidelines require is a degree of formality and objectivity.

For example, to be eligible for this funding, you need a formal recruitment process. Now the only description in the guidelines relating to formal recruitment process is that you must obtain a pool of credible and objective persons and that perjurors and felons would not be considered credible or objective. I don't think that that is entirely unreasonable.

It requires a tester training program and I think that it is very clear that testing is something that people don't do naturally. They must be trained and they should be trained objectively with a full understanding of what the law requires.

TESTER ASSIGNMENT AND CONTROL PROGRAM

Finally, a Tester Assignment and Control Program, and this, once more, is intended to provide a mechanism to assure that there is objectivity.

I was concerned when I heard the assertion made that, if these guidelines were adopted, there would be no cases filed—no cases filed, zero cases. When I find that in a recent case not only filed in the northern district of Illinois, eastern division, in *United States* v. *Dimucci*, which was based on testing conducted by one of the preeminent fair housing organizations in the country, the Leadership Council, that the test which was conducted that resulted in the default judgment, in essence the final conclusion, was described as follows: "A test involves"—and this is the definition that the Leadership Council is using for their successful prosecutions—

> A test involves the sending of a pair of-testers, one white, one nonwhite, matched for income, family size, date and size of apartment wanted, to an apartment rental office to inquire about apartment availability.

All the tests at the Dimucci apartments were conducted by the Leadership Council for Metropolitan Open Communities, a fair housing organization which has been in existence for nearly 20 years.

Senator HECHT. Excuse me. I'm going to ask you to summarize now.

Mr. NORTH. I will summarize by saying that we strongly urge that these guidelines be reflected in the statute. We feel that they are reasonable. We feel that they are appropriately limited and we feel that they will solve many of the concerns and abuses which so frequently have brought members of the real estate community and fair housing groups to loggerheads. We think that it will eliminate conflicts of interest or at least minimize conflicts of interest so that we can work together to solve what is for the real estate industry a very serious problem, and that is assuring equal opportunity in housing.

Thank you very much.

[The complete prepared statement follows:]

STATEMENT
ON BEHALF OF THE
NATIONAL ASSOCIATION OF REALTORS

REGARDING
THE FAIR HOUSING INITIATIVES PROGRAM

TO THE
SENATE SUBCOMMITTEE ON HOUSING AND URBAN AFFAIRS

BY
William D. North
June 18, 1986

I am William D. North, Executive Vice President of the NATIONAL ASSOCIATION OF REALTORS. On behalf of the more than 700,000 members of the National Association, we greatly appreciate the opportunity to testify before this Subcommittee on a subject of vital concern to our organization. The NATIONAL ASSOCIATION OF REALTORS supports fully the vigorous enforcement of the nation's fair housing laws. NAR also recognizes the need for, and supports the use of, enforcement programs such as "testing" of real estate brokers when such programs are based upon uniform and objective standards which measure the performance of brokers and salespeople in terms of compliance with the recognized dictates of the law.

The private enforcement initiative of the Fair Housing Initiatives Program (FHIP), now pending before Congress as S.2507, contains a set of acceptable Guidelines designed to insure that only objective, reliable and controlled testing will receive federal funding. The NAR urges that this Subcommittee adopt the Fair Housing Initiatives Program with these Guidelines as drafted.

As members of this Subcommittee are well aware, the National Association has steadfastly opposed the federal funding of private testing of real estate brokers and salespeople where appropriate standards were not in place. Without such testing requirements, basic notions of fairness and due process are ignored. Unrestricted or uncontrolled testing of real estate brokers is destructive of the rights of the innocent majority of real estate brokers who are committed to equal housing opportunity.

Moreover, with properly observed program and operational standards in a testing program, all parties are served because objective and reliable information is attainable...not so where uncontrolled testing is conducted. Further, the Guidelines we now support in furtherance of private testing contain substantive and procedural safeguards not unlike those governing law enforcement activities by public authorities. For these reasons, the NATIONAL ASSOCIATION OF REALTORS® can only support the Fair Housing Initiatives Program if the Guidelines are included as part of the legislation adopted by Congress.

The National Association is further committed unalterably to the inclusion of these Guidelines in S.2507 because the Association itself has more than met its public responsibility to insure that real estate brokers understand and comply with their generally recognized obligations under the federal fair housing laws. To this end, the National Association was the first real estate trade association to sign a Voluntary Affirmative Marketing Agreement with the Secretary of Housing and Urban Development. The National Association's Code of Ethics includes Article 10 that compels REALTORS® to provide equal professional services to all persons regardless of race, sex, religion, or country of national origin. More recently, the National Association produced and made available to its members a fair housing training program entitled "Brokers, Buyers and Bias." That training program includes the handbook entitled Passwords and Prejudice: A REALTOR® Guide To Fair Housing Compliance, which is appended as an Exhibit to this statement. The National Association believes, therefore, that the historical record of fair housing compliance by the real estate industry as a whole is exemplary.

THE GUIDELINES

A. In General.

The Guidelines contained in S.2507 are not designed to inhibit or deter a valid testing program. On the contrary, by setting forth general standards of eligibility for HUD funded programs, they insure that all organizations -- the tester and the subject alike -- are aware of the criteria under which federally funded fair housing testing will be conducted. If the goal of the Fair Housing Initiatives Program is "to develop credible and objective evidence of discriminatory housing practices", as it purports to be, that evidence can only be obtained when all eligible organizations are operating under the same general rules.

Without common definitions and procedures, brokers, agents and salespeople are at the mercy of a potentially unlimited number of unaccountable organizations conducting tests under different criteria. These Guidelines, however, are not solely for the benefit of otherwise innocent brokers and agents who would be the victims of arbitrary and capricious conduct. They aid the general public and specific classes protected under the law as well. Testing which fails to properly identify and result in the prohibition of discriminatory housing practices because of procedural defects does a disservice to the fair housing effort.

B. Definitions.

The Guidelines contained in this legislation begin with a series of definitions of key terms. It is extremely important that all organizations interested in obtaining funds under FHIP fully understand and comply with the terms used in establishing eligibility.

Particular attention should be given to at least two of these terms. First, the Guidelines define a "bona fide allegation" of housing discrimination as "an assertion of a discriminatory housing practice unlawful under the fair housing law." For the purposes of these Guidelines, however, "an allegation by a person engaged as a tester . . . shall not be deemed a bona fide allegation."*/

The importance of the distinction created by this definition must be emphasized. By limiting bona fide allegations to non-tester complaints and by requiring such allegations to include specific details, the Guidelines insure that federal funds will only be spent on suits designed to redress actual instances of housing discrimination and reduce the likelihood that federal funds will be wasted on unfounded lawsuits.

Many of these suits are the result of unreliable "sweep" testing. Although originally designed to ferret out systematic housing discrimination by a specific firm, "sweep" testing has too often been grossly abused. In the absence of bona fide allegations and controlled testing, fair housing organizations file suits against brokers based on unsubstantiated charges in order to force out of court settlements requiring the broker not only to contribute to the organization but also to patronize the organization's educational seminars and training programs.

The cost to the broker in these cases runs even higher, however. Although brokers, like everyone else, are innocent until proven guilty, the publicity initiated by "sweep" suits can be particularly devastating. The charges damage a broker's name and the good will of his business. And the publicity following vindication is usually insufficient to repair the damage that has been done.

---

*/ A "bona fide allegation" is not limited to a complaint from a bona fide homeseeker, but may also include complaints of housing discrimination generated from any source other than the person or organizations which will conduct a test of validity of such allegation.

The Guidelines included in this legislation will prevent federal funds from being used for these improper purposes. By eliminating tester complaints from the category of bona fide allegations," the Guidelines remove any incentive for an organization to structure a test or interpret test results in order to find a violation. Under the Guidelines, if a test legitimately suggests a violation, the sponsoring organization can transmit the results to the Department of Housing and Urban Development, the Department of Justice, a state real estate licensing board, a community housing resource board or other interested bodies for appropriate action. In addition, the tester and testing agency have those rights of action guaranteed them under the Supreme Court's decision in Havens v. Coleman, 455 U.S. 363 (1982).

The second term of particular importance in these Guidelines is the definition of a valid "test". Without placing any limit on the number of tests made or funded by FHIP, the legislation establishes a minimum level of reliability for testers investigating bona fide allegations of housing discrimination in the rental, financing or purchase of a home or apartment. The most crucial aspect of this definition is the requirement that tests involving alleged discrimination in the purchase of a home "must include one or more visits by at least two individual testers to the sales agent or owner alleged to have discriminated.

The requirement that the testing be done of the same agent is essential to obtaining objective, credible evidence of discrimination. Sales agents are independent contractors over whom brokers have limited control. They have different styles, experience and knowledge about particular neighborhoods. Unless testing is conducted on the same agent in a firm, it is virtually impossible to prove that any differential treatment attributed to the tested firm was due to race as opposed to each sales associate's personality, practices or technique.

Absent this requirement, the tests would lack a control group. In the absence of such control group, the results and the test are inherently unreliable because an important variable -- individual sales agent's practices and technique -- may produce different test results unrelated to the race of the testers. Guidelines, such as those proposed in this legislation, are therefore indispensable to assure an objective and scientific basis for evaluating the test results, and do not hinder the development or goals of the testing program.

C. Eligible Activities.

In addition to defining key terms, the Guidelines set forth three criteria necessary for a testing program to become

eligible for federal funding:

1) A formal recruitment process;
2) A tester training program;
3) A tester assignment and control system.

On their face, these criteria do not attempt to dictate the content of the test. Instead, they address key procedural concerns which are essential to the development of objective, reliable testing programs.

First, the Guidelines require that all eligible programs have a "formal recruitment process designed to obtain a pool of credible and objective persons to serve as testers." Since most testers are volunteers who have little experience in fair housing matters, it is important that an organization attract competent and trustworthy people. Individuals with felony records or convictions of crimes involving fraud or perjury have serious credibility problems and must not be used as testers. Other than this common sense limitation, the Guidelines do not attempt to designate specific types of individuals as testers. They only require a designated recruiting plan to obtain reliable people for the job.

Once these individuals have been recruited, they must be trained to perform proper tests. The Guidelines require a training program which emphasizes careful recordation of relevant information on standardized forms; no communication between testers until all information has been recorded; and procedures which require the tester to identify himself as having the same substantially equivalent demographic profile and housing needs as the individual who made the bona fide complaint. These requirements assure a minimum level of objectivity and reliability for the test.

The third eligibility criteria is, without question, the most important element of these Guidelines. This criteria requires that a program have a test assignment and control system which assures that neither the tester nor the organization conducting the test have an interest, economic or otherwise, in the outcome of the test. While Guidelines do not prohibit testers from recovering damages for a cognizable injury, they do prohibit testers from having any bias or conflict of interest that would prevent or limit the tester's objectivity or fairness.

Under current general enforcement schemes, program sponsors have an economic interest in initiating fair housing litigation in the expectation that settlement monies will be paid by the defendant to fund the organization's activities. Simply put, the economic reality of fair housing litigation for a defendant makes the filing of fair housing complaints a highly efficient form of fund raising and publicity for a private fair housing organization.

Some housing groups have justified such fund raising on the grounds that they must finance their programs and future testing projects from the funds received in the settlement of testing suits. This justification disappears, however, when the cost of the testing programs is underwritten by federal funds. If a major enforcement role in the battle for fair housing is to be delegated to private entities, then the independence and impartiality of these entities must be beyond question.

D. Application Requirements.

Applications for federal funds under the private enforcement initiatives of FHIP are also covered under the Guidelines in this legislation. In addition to requiring a description of the recruiting process and training program and copies of the relevant tester forms, the application standards have two other important elements: first, they require an applicant to have at least one year of experience in carrying out similar programs; and second, they require certification that the applicant will not solicit funds or seek to provide fair housing services to any organization which has been the subject of testing by the applicant within the prior twelve months period.

As explained earlier, fair housing organizations solicit contributions from boards and brokers to support their activities. They also sell education and training programs to prepare agents for future tests. In the absence of standards, the implication is clear: rejection of a training proposal could result in tests and possibly a lawsuit; acceptance of a proposal could result in either a favorable test result or no testing at all.

The FHIP Guidelines are designed to reduce the fear that tests are intended merely to "shake down" real estate firms rather than eliminate discriminatory conduct. They remove the potential for economic intimidation by removing an obvious conflict of interest. The result is that federally funded tests will be more objective and reliable.

E. Performance Monitoring.

The final section of the Guidelines details a scheme for monitoring compliance with the requirements of the law and includes a range of sanctions for violations. This provision is necessary to insure that applicants abide by the carefully crafted standards we have discussed today. In the absence of such sanctions, meaningful enforcement of the Guidelines would be impossible.

CONCLUSION

In conclusion, the NATIONAL ASSOCIATION OF REALTORS® firmly believes that the Guidelines contained in this legislation are a fair and minimally restrictive means of guaranteeing that federal funds will be used only for objective and reliable testing. Both the Department of Housing and Urban Development and the NAR are satisfied that the Guidelines will not infringe on either the proper role of the courts in adjudicating fair housing complaints or the rights and remedies provided to individuals and testers under federal law. We urge you to adopt the legislation as written.

Thank you for giving me the opportunity to express the Association's position on this matter. I will be happy to answer any questions you may have.

The NATIONAL ASSOCIATION OF REALTORS® is comprised of more than 1,806 local boards of REALTORS® located in every state of the Union, the District of Columbia, and Puerto Rico. Combined membership of these boards is over 700,000 persons actively engaged in sales, brokerage, management, counselling, and appraisal of residential, commercial, industrial, recreational and farm real estate. The activities of the Association's membership involve all aspects of the real estate industry, such as mortgage banking, home building, and commercial and residential real estate development, including development, construction and sales of condominiums. The Association has the largest membership of any association in the United States concerned with all facets of the real estate industry.

Elected officers are: President, Clark E. Wallace, Moraga, California; President-elect, William M. Moore, Denver, Colorado; First Vice President, Nestor R. Weigand, Jr., Wichita, Kansas; Treasurer, Phillip C. Stark, Madison, Wisconsin.

The Executive Officer is William D. North

The Senior Vice President, Government Affairs is Albert E. Abrahams and the Vice President and Legislative Counsel, Government Affairs is Gil Thura.

Headquarters of the Association are at 430 North Michigan Avenue, Chicago, Illinois 60611. Telephone: (312) 329-8200. The Washington Office is located at 777 14th Street, N.W., Washington, D.C. 20005. Telephone: (202) 383-1000.

REALTOR®

Senator HECHT. Thank you very much, Mr. North.

To what extent could there be standardization of testing practices by private testing groups?

Mr. NORTH. To what extent will there be——

Senator HECHT. Could there be?

Mr. NORTH. Well, I think that depends on the standards of the private testing group. As indicated, the guidelines merely mean or merely require that in order to obtain Federal funding the testing group must set down articulately, clearly, and comprehensively the procedures for recruitment, for management, and for training that they propose to utilize, with, of course, the exception that they ought not recruit felons and perjurers.

Senator HECHT. To what extent is there a conflict of interest when testers are allowed to file complaints of housing discrimination?

Mr. NORTH. Well, we believe this is the basic problem which these guidelines are attempting to address. Let me read to you—and if you'll indulge me for just a moment, but I think it epitomizes the concern which the real estate community has in this area. These are the words of Judge Leighton, who had occasion to hear a case and decide a case, a case of *Bellwood* v. *Dwayne Realty*. He said as follows:

> The testers were not disinterested witnesses. They instigated this suit. They tested Dwayne Realty in order to advance economic and noneconomic interest of theirs they thought were at stake. They were candid in admitting to having strong feelings against real estate brokers in general and these defendants in particular because of developing social conditions in their village which they attributed to them. When a person has a strong interest in the outcome of a case, when he harbors strong feelings against a party, the tendency is for him to shape his sensory reactions to that they fit the testimony he wants to give.

IMPERATIVE THAT TESTERS BE NEUTRAL

Our concern is with objectivity in testing. It concerned me when Mr. Martin commented that there aren't any neutrals in a particular county in Kentucky. I suggest to you that if you are going to conduct objective testing it is imperative that the tester be neutral.

But having said that, I want to emphasize one point and correct one point which appears also to have been misunderstood. The tester and the testing organization under these guidelines specifically has all of the rights and remedies for recovery and damages that are guaranteed to him at the present time under the *Havens* case by the Supreme Court and any other decisions they can bring and make relevant.

So these guidelines are not intended to limit or abort the rights and cause of action which is guaranteed under the *Havens* case to testers when they are affected.

Senator HECHT. Thank you very much.

Senator Proxmire.

Senator PROXMIRE. Mr. North, I understood you to say that your intention and your expectation is that the guidelines would be limited to the private Fair Housing Initiatives Program and that's all. Is that right?

Mr. NORTH. My expectation and my understanding is that they are limited to the Fair Housing Initiatives Program.

I would have to add, Senator—and this I think is where my testimony may have been misunderstood by the other panels—that we would hope that any good test program, any good test guidelines would prove themselves in the marketplace, be it the courts or wherever, so that they would be more generally adopted and recognized as valid.

So we understand that these guidelines will be applied only in respect to the FHIP Program to the extent Federal funding is applied under that program and to no other.

Senator PROXMIRE. Well, I'm confused because you say in your statement—this is the National Association of Realtors, page 2, you say,

> We would hope and expect that these guidelines if enacted into law would impact not only the FHIP funded testing programs but would also become the measure of fairness and objectivity by which courts and enforcement agencies measure all real estate testing.

Mr. NORTH. Certainly.

Senator PROXMIRE. You want it for everything.

Mr. NORTH. We said we hope and we would expect, and I think I already said that we think that they are sound, solid, good guidelines for testing in any context. But that does not detract from the fact that in our understanding of this law and these guidelines as related to the FHIP proposal that they are limited to tests conducted with funding under FHIP.

Senator PROXMIRE. I think I understand you but you can understand why the previous witnesses were concerned that this would not be just confined to this one program, that it would be across the board.

Mr. NORTH. Sometimes, I——

SWEEP TESTING

Senator PROXMIRE. Let me ask you this. On page 3 of your statement you refer to sweep testing. Are sweep tests the same as systemic tests which don't necessarily involve a bona fide homeseeker?

Mr. NORTH. We have not construed them as the same. Sweep testing in our experience, Senator, has been testing in which testing agencies go out and they will test one salesperson with say a black tester in a real estate office and then they will test another salesperson in that office with a white tester and then they will test another salesperson. In other words, where we don't have the testing of the same salesperson. This creates significant problems because as I think one of the panel members commented the way you do the real estate business, the way you sell real estate varies widely from salesperson to salesperson, and your response and reaction to properties you sell and how you do things will vary. And we think that the only effective way or at least the most effective way—and this is the way we have proposed here—to accomplish responsible testing is to assure that the same agent is tested.

Senator PROXMIRE. Now you say that sweep testing "has often been grossly abused." You go on to say that "in the absence of bona fide allegations and controlled testing fair housing organiza-

tions file suits based on unsubstantiated charges in order to force unfair settlements."

That's a pretty strong and pretty general charge against fair housing organizations. I'm not from Missouri, the "Show Me" State, but we in Wisconsin also prefer to deal in specifics like who, what, where, and when before we make up our minds about things.

Can you give me an example of the gross abuse you describe from my State of Wisconsin?

Mr. NORTH. Not in Wisconsin, Senator, but I have had—well, I have a situation in Wisconsin where an organization indicated that they were going to undertake a testing program and having so indicated to the board of realtors that they were going to undertake the testing program, then said, "Why don't we skip over the results of the testing which we know will result in our finding defects in the manner in which you treat customers, and why don't we just merely educate you and why don't you hire us as the source of your education in the fair housing field?" Now the price of that was $50,000, at least the initial price of that was $50,000.

[Response to testimony of William North from William Tisdale follows:]

EXTRACT FROM REALTOR TRAINING PROGRAM

EQUAL OPPORTUNITY IN HOUSING

Testing:—We want to make you aware of what is happening in the State of Wisconsin in the area of testing. We do have civil rights attorneys in the State. A civil rights attorney is only an attorney who has decided to specialize is prosecuting civil rights cases. Civil rights attorneys are oftentimes paid for by fair housing councils. Fair housing councils normally get Federal grants and Federal grants are funded thru taxes, so we are paying the attorneys who are suing us. Its that simple. In addition, HUD and DILHR fund the housing councils in order to help the protected class. Do you know what the protected class is? Don't say that we don't have them in the Fox Valley, in fact many are sitting here today. Women are a protected class, as are races, creeds, color, religion, sex, and the handicapped. These are not necessarily a minority but it is a protected class. They don't need protection, but they get it. The problem is that we often do not have a clear picture of what is a protected class. We look at it normally as black/white. Not so in the Fox Valley, we must also consider the HMONGS.

A tester, a person who deliberately tries to get you to discriminate against them to see if you will do it. They are trained to ask questions, to give you a sly wink, a nod of the head to see if they can entrap you. They can collect damages, the company they work for can collect damages. They can wear tape recorders and it is admissable in court.

There are fines imposed for violations of The Fair Housing Act, there aren't many realtors that are able to spend the wad of money to defend themselves against a fair housing charge. The fines set by Congress are from $1,000 to $10,000 for the first offense and $20,000 for the second offense. There is a bill which proposes to increase the fine for violation to $50,000 for the second offense—your temptation is going to be to settle—these "testers" may even say pay our company the cost of what it would be to defend yourself against the claim and we will educate your company and then we will protect you. You used to have to establish a pattern of practice but you had to do it several times to establish the pattern, and no, you don't have to establish the pattern now, nor show intent.

Testers are moving closer to the Fox Valley, if they aren't already here. In fact, in Wisconsin there is a move, the Fair Housing Councils are advocating a migration to the Fox Valley because of the lack of minorities, and the advantages available for jobs, schools, and other opportunities in the valley. Be sure that if the migration is effected, the civil rights attorneys in the State will follow the migration.

The WRA equal opportunity in housing committee has been studying this for the past year and holding seminars on protecting yourself. Our chairman attended a seminar where an attorney, Avery Freidman from South Carolina spoke. He is a trial lawyer specializing in equal fair housing and said: Although realtors felt that signing the affirmative marketing agreement was going to protect them, Atty Friedman said we are going to put realtors out of business and to aide fair housing representatives (not to mention that Atty Friedman is getting rich conducting these seminars).

It was also brought to the attention of the attendees that the Justice Department intends to file 500 discrimination suits between now and election time in November. The main objective of the attorneys, is to turn one of these suits into a class action suit for $1 million against a real estate firm. Anticipating the decision to go against the real estate broker, it is intended to use this decision in future suits against brokers. It only costs $60, to file a suit and the complaint moves rapidly through the courts.

Wauwatosa Realty in Milwaukee * * * a $100,000 consent decree that they didn't do anything wrong but won't do it again. They found that they were still "steering" and have again filed against them.

Remember it is the law of the land:

Undesirable housing practices prohibited by the Federal Fair Housing Act of 1968.

Blockbusting—inducing homeowners to sell by making representations regarding the entry or prospective entry of minority persons into the neighborhood.

Steering—channeling homeseekers to particular areas either to maintain the homogeneity of an area or to change the character of an area in order to create a speculative situation.

Redlining—refusing to make mortgage loans or issue insurance policies in specific areas.

Senator PROXMIRE. Well, our State is a pretty big State, as you know. You cited one example. Do you imply that this abuse is widespread?

Mr. NORTH. I think that it depends on the fair housing group and some—we have been working with a large number of fair housing groups across the country through our affirmative marketing agreement and the community housing resources boards, and by and large we have found that a large number—the vast majority of the fair housing groups are truly concerned with the problem and with working with us in recognizing that there is a public-private partnership that's required to solve it.

However, we have seen very serious cases of abuse in our view and it's the old adage that you are attempting to correct the abuse to prevent the abuse and to avoid having this program become an incentive for abuse. This is what concerns us.

TESTS PERMITTED THROUGH A PATTERN OF DISCRIMINATION

Senator PROXMIRE. Now I asked that because Wisconsin law permits tests without bona fide allegations where reasonable men can conclude there's a pattern of discrimination. That's what the law provides in our State.

Your statement indicates that if there should be widespread abuse in Wisconsin—you've cited one instance, but it's my experience—and I've gone through my State probably as nobody else ever has—that there isn't that abuse.

Mr. NORTH. Well, I think that you have said that there could be filing—would you repeat your provision of the law that you cited, sir?

Senator PROXMIRE. Yes. The law permits tests without bona fide allegations "where reasonable men can conclude there is a pattern of discrimination."

Mr. NORTH. Now the question is, how do you and who develops the concept that there is a pattern of discrimination? How do you arrive at a pattern of discrimination?

Senator PROXMIRE. Well, the courts do that. The courts may make a finding that there's a pattern of discrimination that's been established.

Mr. NORTH. Well, I could only say, Senator, that the purpose of these tests is not evidentiary. It is for the purpose of establishing a procedure by which this money will be spent and the investigations will be undertaken. I think there is a very real concern about this whole area of what I'll call invasions of your personal rights and privileges. I believe that there have been concerns expressed by this Congress about testing where there is no underlying complaint in the area of AIDS testing, in the area of polygraphs of private corporations that are dealing with Government, in the area of narcotics usage by Customs——

Senator PROXMIRE. Well, if I could interrupt, Mr. North, we're talking about fair housing here and I want you to give me, if you can, a specific example of a fair housing organization that has sweep tested and then coerced someone for profit. Has the National Association of Realtors, which clearly has adequate finances, acted to join law officials in curbing the abuse and coercion you have laid

at the door of fair housing groups—which it's my understanding are all not-for-profit organizations which operate on a shoestring, and are under close public scrutiny?

You see, here we have a situation where the National Association of Realtors, a fine group—they have the biggest political action contributions to Members of the Senate and House of any group. You're fighting with nuclear weapons here. You're fighting against a little organization that can't make any PAC contributions to those of us who are in office. So you have an enormous advantage. You have all kinds of firepower.

And I'm asking you to give me just an example of where this sweep testing has profited anybody. Fair Housers generally do their work because they feel very deeply about the discrimination against minorities.

Mr. NORTH. In Chicago, the Leadership Council brought four suits based on wide-ranging tests which did not include these guidelines. They've since incorporated these guidelines into their testing procedures. They tried these suits or at least the suits were scheduled to be tried in serial. The first one took exactly 45 minutes for the jury to find the defendant not guilty on the basis of inadequate testing and inadequate evidence.

However, the cost of defending these suits its very, very high and there is no prospect whatsoever of the defendant recovering his attorney's fees because there is no such thing as a contingent fee defense.

The result was that the remaining three—although I think the conviction of all of the attorneys was that they had a very sound and valid defense since they had been tested under the same program that had resulted in the discharge of the original defendant—paid $22,461 in contributions to the Leadership Council. This is what we're concerned about—$22,461. Not in damages, not in settlement, but in contributions to the Leadership Council. We are concerned about these problems. Now the Leadership Council has modified their rules and their test procedures and we are very hopeful based on the *Dimucci* case that this problem will be resolved.

[Response to testimony of William North from Kale Williams follows:]

METROPOLITAN MILWAUKEE FAIR HOUSING COUNCIL

William R. Tisdale, Executive Director

July 14, 1986

Senator Chic Hecht
Chairperson
United States Senate
Subcommittee on Housing and Urban Affairs
Washington, D.C. 20510

Dear Senator Hecht:

The following information is provided to the U.S. Senate Sub-committee on Banking, Housing, and Urban Affairs in response to a statement made by William North of the National Association of Realtors.

Senator Proxmire asked Mr. North if he (North) had any evidence of money being requested by a fair housing group from a realtor or realty company in lieu of the fair housing group filing discrimination charges based on potential evidence of illegal discriminatory practices by the realtor or realty company. Mr. North responded:

> "Not in Wisconsin, Senator, but I have had--well--I have a situation in Wisconsin where an organization indicated that they were going to undertake a testing program, and having so indicated to the Board of Realtors that they were going to undertake the testing program, then said, 'why don't we skip over the results of the testing, which we know will result in our finding defects in the manner in which you treat customers, and why don't we just merely educate you and why don't you hire us as the source of your education in the fair housing field?' Now the price of that was $50,000.00, at least the initial price of that was $50,000.00."

The only situation that the Wisconsin Fair Housing Council (WFHC), comprised of all five (5) fair housing organizations in existence in Wisconsin, is aware of which even remotely resembles anything in Mr. North's example is the following case which occurred in Beloit, Wisconsin.

A housing discrimination complaint filed by Mr. and Mrs. Moore with the Fair Housing Council of Rock County (Beloit,Wisconsin) was investigated and referred to the Wisconsin Equal Rights Division (ERD) for conciliation on November 15, 1985. The complaint filed by the Moores alleged that Century 21 Hart and Kruse had engaged in racial steering. The Moores, an interracial couple, alleged that an agent of Century 21 Hart and Kruse had directed them only to predominantly black areas of the city. Further, when the Moores located a home (on their own) in a white neighborhood,

1845 North Farwell Avenue Suite 310E, Milwaukee, WI 53202 (414) 272-5232

the agent made purchasing the home difficult for the Moores and otherwise discouraged the Moores from purchasing that property.

The ERD found probable cause of discrimination - in favor of the Moores. During the course of conciliation, the Moores requested as part of their settlement, $23,000.000 and a provision that employees of Century 21 Hart and Kruse receive fair housing training from the fair housing group. The Moores prevailed, receiving $23,000.00 and requiring Century 21 Hart and Kruse to provide fair housing training to its employees (conciliation agreement was finalized on or about March 31, 1986).

Shortly thereafter, Mr. Hart (of Century 21 Hart and Kruse) contacted the Fair Housing Council of Rock County to arrange the terms and content of training to be provided. The total cost of the training was $130.00, which was paid to the fair housing group.

Where Mr. North comes up with the other information in his version of this case, especially the implied coercion/extortion of $50,000.00 for training to avoid legal/administrative processes is unknown.

Mr. North has made a serious accusation against the private fair housing organizations of Wisconsin, alleging practices which are not only unethical, but which border on being illegal.

At no time has or will any fair housing organization, affiliated with the Wisconsin Fair Housing Council, approach any housing provider and deal to circumvent legal or administrative remedial resources in exchange for monetary or other considerations.

Mr. North's statement in response to Senator Proxmire's question is totally without merit or substantiation.

Respectfully submitted,

William R. Tisdale

William R. Tisdale
Coordinating Director
Wisconsin Fair Hou ing Council

WRT/lb

62

STATEMENT FOR THE RECORD
SENATE SUBCOMMITTEE ON HOUSING AND URBAN AFFAIRS HEARINGS
JUNE 18, 1986
ON THE FAIR HOUSING INITIATIVES PROGRAM
PART OF SENATE BILL 2507.

KALE WILLIAMS, EXECUTIVE DIRECTOR
LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES
220 SOUTH STATE STREET - CHICAGO, ILLINOIS

In the hearings held on June 18, 1986, Mr. William North, Executive Vice President of the National Association of Realtors, (NAR) in response to a question from Senator Proxmire, made false and damaging statements about the Leadership Council. We appreciate this opportunity to set the record straight.

The Leadership Council for Metropolitan Open Communities is a private, not-for-profit fair housing agency serving the Chicago metropolitan area. It was founded in 1966 as a direct result of a movement for open housing led by Dr. Martin Luther King, Jr. Its Board of Directors is made up of business, civic, religious, government and civil rights leaders. The Leadership Council has brought nearly 800 civil suits under fair housing law, most based on tester evidence. Nearly 90% have been successful. Any payments received by the Council from defendants have been damages or attorney's fees awarded by the court or agreed to in settlements filed with the court.

Mr. North cited law-suits in which he alleged that Leadership Council received $22,461, "...Not in damages, not in settlements, but in contributions to the Leadership Council..." (quote from transcript of hearings). In fact, the amount was not correct and the payments to the Leadership Council were damages and attorneys fees detailed in consent orders filed with the U. S. District Court. Mr. North further stated that the Leadership Council has incorporated "these guidelines" [referring to the guidelines negotiated by NAR with the Department of Housing and Urban Development (HUD)] into its testing procedures, and implied that there had been some deficiency in our testing procedures. In fact, in these four cases and in seven others, the United States Department of Justice filed companion suits, and obtained consent orders, based precisely on the evidence obtained by the Leadership Council through those testing procedures. The Leadership Council has not modified its procedures based on these cases nor on the DiAucci case referred to by Mr. North, which is inapposite and has no bearing on testing procedures.

The suits to which he refers resulted from testing of ten real estate firms in southwest suburban Chicago, all members of the Southwest Suburban Board of Realtors, in 1983. Testing in this area was based on demographic evidence that almost no blacks lived there and most schools were segregated white schools, although the area was close to areas of black residence, had a wide range of housing price and style, and contained growing job markets.

Discrimination against black testers was found in each firm. In four firms the evidence was particularly strong and confirmed by multiple tests. In these four cases, suits were filed by black testers who were given false

Senator PROXMIRE. My time is up, Mr. Chairman. Thank you.

Senator HECHT. Thank you, Senator Proxmire.

Senator Heinz, you're here at the end. You can have an opening statement, ask questions, and the closing statement all at the same time.

STATEMENT BY SENATOR JOHN HEINZ

Senator HEINZ. Mr. Chairman, thank you. I would like to speak briefly on today's hearing regarding the Fair Housing Initiatives Program [FHIP]. First, let me commend you and our distinguished ranking member, Senator Proxmire, for holding this hearing today.

I believe that this hearing is an important forum in which to discuss the FHIP which the committee has included in the Housing Act of 1986. In my mind, and I believe in the minds of our committee members, what we propose to do by creating the FHIP is to enable the Department of Housing and Urban Development to play a more effective role in efforts to eliminate discriminatory practices in housing by assisting private organizations that seek to improve enforcement of our fair housing laws. In creating this program, we are mindful that the principal means for enforcement of the Federal Fair Housing Act is our court system.

I would be particularly concerned if this program was perceived as being inconsistent with fair housing laws, the existing body of case law, and ongoing enforcement efforts. Rather, this legislation provides a source of funds and an administrative structure in which private nonprofit groups may better enforce our Federal fair housing laws and eliminate discrimination in housing. It is my hope that by creating this mechanism, we will improve the means by which fair housing disputes are resolved by the courts, and reduce some of the costs and time associated with this litigation.

I hope that this morning, we will be able to clarify two matters: First, that the intent of this program is to augment, rather than limit, our current law and judicial processes to enforce that law; and second, whether affected parties believe it will enable them to pursue effectively the goals of eliminating discrimination that we all share. With that, let me say I look forward to hearing from our excellent panel of witnesses today.

Thank you, Mr. Chairman.

Mr. North, I'd like your opinion on the following: Do you feel that the guidelines that have been negotiated here are inconsistent with court decisions in cases in recent years?

Mr. NORTH. I sincerely do not. I have been general counsel for the National Association of Realtors and involved in a variety of other first amendment and constitutional issues for 16 years and, in my opinion, this issue is not over the question of testing. Testing was settled. I do not believe, Senator, that these are inconsistent with established procedures or recognized practices and policies of the courts.

Senator HEINZ. Do you think they are different, if they are not inconsistent?

Mr. NORTH. Do I think that they are different?

Senator HEINZ. Yes.

Mr. NORTH. I think what we have attempted to do is to identify the tests and procedures which have been validated over the years as producing responsible, reliable, and nondiscriminatory forms of complaints and prosecutions, and attempted to incorporate them into this program which is, after all, the first—if I'm not incorrect—the first federally funded testing program addressed directly to private organizations, private fair housing organizations.

Senator HEINZ. Thank you, Mr. Chairman.

Senator PROXMIRE. I just have two more questions. Now, Mr. North, you make a particularly strong argument to me for restricting testing to bona fide allegations when you say on page 3, "The guidelines reduce the likelihood that Federal funds will be wasted on unfounded lawsuits."

You probably didn't know that I have a thing about wasting Federal funds. I would again, however, appreciate some facts that would counter the opposite finding of the Urban Institute which reported that systemic testing programs appear to provide the single most effective means available to discourage discrimination and enforce fair housing laws, although agencies reported they could be time consuming and costly.

GUIDELINES ARE NOT A DETERRENT TO TESTING

Mr. NORTH. Well, I think the confusion seems to be a semantic one, Senator. We do not see these guidelines as inhibiting or preventing systemic testing. Therefore, I don't see how they could constitute a deterrent. We merely say that if you're going to—if you, as a testing organization, are going to undertake a testing program, you should have a complaint from somebody other than yourself. It could be from the community, from a neighbor, from a city councilman, but not confined or in any way restricted to a bona fide home seeker or apartment seeker or a homeseller. We are talking about a source of a complaint other than the organization that is going to investigate the complaint and I just think it would not be appropriate, for example, for an FBI agent to originate—wake up in the morning and say, "I think I will initiate a complaint and a test"—because they are law enforcement officers. You are looking at and for objectivity, as Judge Leighton said in his quotation. It is critical that both the image and the reality of independence and objectivity be preserved in this testing effort.

Senator PROXMIRE. You see my problem, Mr. North, is these guidelines would would vitiate Wisconsin law. I served in the Wis-

consin Legislature—and it hasn't changed very much. There are practically no blacks there. There are very few minorities. There are a couple of women. It's primarily a white male legislature. They enacted a strong Fair Housing law. Now it seems to me that these guidelines, if they do what you say you hope they will do, which is become the measure of fairness and objectivity by which courts and enforcement agencies measure all real estate testing, would overrule the determination of a legislative body in my State.

Mr. NORTH. I would not see this as being capable of overruling Wisconsin law unless the legislature of Wisconsin decided to adopt the same guidelines because this doesn't apply to the appplication of Wisconsin fair housing law or the human rights law and, for that matter, it doesn't even apply to the Fair Housing Assistance Program.

Senator PROXMIRE. That's the way it begins, but the Federal Government could certainly extend this and very well might, especially in view of the real political power you have with your PAC contributions.

TRIED ON A LIMITED BASIS

Mr. NORTH. Well, I think the only way in which it can be extended—and, of course, the best way to know if something should be extended or not is to try it out on a limited basis, as we are proposing be done and let it prove itself in the marketplace. If it does not prove well, if it proves too restrictive, then I would certainly think that an alternative to FHIP might be undertaken by this Congress.

On the other hand, if it proves worthy, then it might be extended. But that is your discretion and the judgment of those who will have a chance to see how it works.

Senator PROXMIRE. Would you support a sunset of these provisions? In other words, have them expire after 2 or 3 years?

Mr. NORTH. I don't think I'm in a position to support a sunset provision. That was not the mandate, at least under——

Senator PROXMIRE. I understood you said let's try them out and see if they work.

Mr. NORTH. That's right.

Senator PROXMIRE. If you don't have a sunset in the law it's very hard to get something like this out of the law.

Let me ask you this. Mr. North, you make a reasonable case for requiring that tests of alleged discrimination in home buying "must include one or more visits by at least two individual testers to the same agent." But so does the tester from Milwaukee who says that he might as well wear an official badge when he goes to conduct a test under your guidelines after receiving a complaint in a smaller suburban community where few minority families ordinarily seek housing.

Suppose one does look and does feel that he was not given an opportunity to see all that is available. Under the guidelines you developed, the tester must take at least two other individuals with identical characteristics in to the same agent. What's an agent to think when, on rather short notice, two similar black families and one white one come to him? Isn't there a reasonable probability

that testing under that requirement will be a waste of Federal money?

Mr. NORTH. I don't think so because I also heard the comment made by the same person from Wisconsin saying that any black that shows up in any given community or in certain given communities is automatically perceived by a broker as a tester.

My concern is this. One or the other position has to be right. They cannot both be right. If a person who is black turns up in a community and is perceived as a tester, it is absolutely by certain that a real estate broker would knowingly or even inadvertently do anything except make sure that that black tester is shown the most number of properties he could possibly want and is treated in the most nondiscriminatory manner.

So, on the other hand, if a black shows up and is not perceived as a tester, then certainly it's clear that another black that shows up would not be perceived as a tester and a white would not be perceived as a tester and, in any event, the point of the matter is you're comparing—you may know that the black is a tester, but you don't know which of the whites is a tester and that the white is the one that you're allegedly involved in discriminating against as well as the black.

Senator PROXMIRE. Well, I have great respect for you, sir. You're a very intelligent and persuasive witness and you certainly earn your pay, but I must say that we have a law on the books now. It's been making, I think, hesitating and painful progress, and I hate to see us reverse that law. I think that's what we may well be on the way to doing, if we enact these guidelines

Thank you, Mr. Chairman.

Mr. NORTH. With all due respect, Senator, the national association and our people feel that this is a great, great step forward in the enforcement and in the implementation of objectives of the fair housing law. We believe that it has been too long since we have in a sense got to break down the stereotyping and we've got to work objectively to identify the bad people but we also should not be in the position of having to prove our innocence when we believe that the vast majority of real estate brokers in this country are committed to equal opportunity in housing.

ANTAGONISTIC ATMOSPHERE

Senator PROXMIRE. How do you account for the fact that the fair housing groups, black and white, so overwhelmingly, and with such a strong consensus, oppose your position?

Mr. NORTH. Well, Your Honor—pardon me, I fell into the same trap that Mr. Friedman did earlier. We spend so much time in court against each other that we forget our forum. I think it's a matter of perspective and I think that when you have a tradition which is built up in an antagonistic atmosphere, it is very, very hard to break it down. It's hard to view the others with trust. I think this permeates the relations with a variety of nations as well as a variety of groups. You have to take the first step. You have to be cautious. You have to show people that they can work with each other, that they can expose themselves to each other without suffering adverse consequences.

In this particular case we have had very honestly had bad experiences with a number of fair housing organizations. Mr. Friedman cited a case on that panel in the circuit court. That case cost the real estate broker $600,000, more than $600,000, to defend. The damage awarded in that case was $1. That was the result of the test—a $1 damage award, and exoneration for the broker.

Now when you encounter this type of problem, there is an incentive to settle when you receive a complaint because the cost of defending your innocence is intolerable in today's society, you get sensitive about random groups running around on a given day saying who should I test and without any sort of guidelines or rules or regulations on the criteria by which people will be tested.

Also, Senator, I believe you are aware that there is a very fundamental schisms, even within the Government but certainly among fair housing groups, as to what the fair housing law requires. Does it require equal opportunity in housing or does it require integrated housing? This is an issue which is not presented here but it's an issue which adds to the mistrust and concern.

Senator PROXMIRE. Thank you, Mr. Chairman.

Senator HECHT. Thank you very much, Senator Proxmire. I want to thank you for asking for this hearing. Being from Nevada, watching people play poker, I can look into the audience and tell that there's a lot of people who want to say a lot of things. I will remind you that the record will be open for 2 weeks after this hearing, so if you want to submit additional testimony for the record you have 2 weeks.

I want to thank Mary Dwyer Pembroke of my staff and Bob Malenkoff of the minority staff for putting these hearings together. I certainly want to compliment them on the excellent witnesses and the cross-section which has added to the spirited debate today. I also want to thank Jerry Wyrsch and Phil Sampson of the subcommittee staff.

The hearing is adjourned.

[Whereupon, at 10:55 a.m., the hearing was adjourned.]

[Additional material supplied for the record follows:]

[From the Washington Post, July 21, 1984]

NATION'S POLICY ON INTEGRATION AT CROSSROADS

(By Ann Marino)

The Reagan administration is bent on changing the way the government defines integrated housing and on the way it enforces fair housing law. The standard bearers are Justice Department attorneys under the leadership of civil rights division chief William Bradford Reynolds.

In taking this position, the Justice Department differs from its predecessors in the Carter administration, many fair housing advocates and the administration's own Department of Housing and Urban Development.

If Reynolds succeeds in greatly narrowing the interpretation of the Fair Housing Act, which includes the premise that quotas, benign steering and other integration maintenance techniques are illegal, residence patterns in the nation will be profoundly changed. Critics say resegregation will take place in many areas.

If fair housing groups prevail, the outlook is for growing use of quotas and other means of maintaining an integrated population in federally assisted housing areas and, to some extent, in suburban subdivisions.

Quota is an explosive word when applied to housing. Proponents prefer to use other terms, and the Reagan administration usually uses it on "quotas," he added. Developers, however, have said HUD asks them to maintain a 20 percent to 30 per-

cent minority population in their projects, but says in effect, "If the fair housing division of Justice sues, don't come to us," according to Oscar Newman, an urban planner and integration expert. HUD "never puts this [minority requirement] in writing" but often makes it a condition of approval of funds. Newman said his information comes from a survey he made of about 30 large developers of HUD-financed housing across the country.

Jane Lang McGrew, HUD general counsel in the Carter administration, attempted to clear up some of the confusion for HUD in a letter to an assistant secretary of the department. She said Congress made it clear in passing the Fair Housing Act that it intended that "truly integrated housing patterns" be established.

"The Supreme Court has expressly recognized that 'substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment to promote integrated housing by the enactment of Title 8 (the Fair Housing Act),'" she said.

Ironically, McGrew wrote that letter Jan. 16, 1981, four days before the Carter administration left office.

Several court challenges to the Fair Housing Act in the last decade have resulted in several decisions approving some forms of integration maintenance techniques.

Several lawsuits filed recently by the Justice Department have been based on Reynolds' interpretation of housing law. The most notable one involves Starrett City, a mammoth housing project in Brooklyn.

Integration at the complex is achieved by using a quota, under which tenants are selected so as to maintain the population at 65 percent white and 35 percent minority, mostly blacks. A lawsuit against the management of the complex was filed by black families who argued that blacks had to wait much longer for an apartment than did whites. A settlement in the five-year-old suit was announced this spring. It increased the minority share of apartments by 175, and ordered that a greater minority population be achieved in 86 state-subsidized housing projects in New York City.

After the settlement was announced, the Justice Department filed suit against Starrett City, charging that it violated the Fair Housing Act in using racial quotas to select tenants.

Critics say Justice hopes to get court decisions that support its interpretation of the fair housing law and sees Starrett City's quotas as a good opportunity.

Starrett City's champions see the residents of its more than 5,800 apartments in a small city of buildings as an outstanding example of the need for, and the success of, integration maintenance programs.

Newman has examined Starrett City and neighboring housing projects and said that "in all instances where the housing agencies have not used occupancy controls, or quotas, the projects have turned predominantly black."

The Starrett City waiting list contains more than twice the number of blacks than whites. Newman said that without the quotas, the big project "will turn predominantly black."

Because of its location "in a market with overwhelming minority demand and undersupply of housing, particularly subsidized housing," Starrett City would go over the "tipping point" and become predominantly black, said Morris Abram, attorney for the housing project and vice chairman of the U.S. Civil Rights Commission.

Blacks and other minority tenants are much more willing to live with whites than the reverse, said Newman.

"Minorities prefer housing that is 80 to 50 percent white, and whites prefer housing up to about 20 percent minority," he said. "If this market force is not controlled, a project built within a short distance * * * of a minority community will probably become all minority."

Blacks form 11.8 percent of the population and earn 60 percent of what whites earn. If the nation's housing becomes predominantly minority housing," support and funds will begin to erode, Newman said.

[From the Washington Post, June 21, 1986]

CRITICS SAY U.S.-REALTORS DEAL GUTS ANTI-DISCRIMINATION EFFORT

(By Ann Marino)

HOUSING GROUPS "OUTRAGED" AT U.S.-REALTORS AGREEMENT

An agreement between the Reagan administration and the politically powerful National Association of Realtors gutted proposed legislation designed to strengthen enforcement of laws against housing discrimination, several witnesses told a Senate subcommittee this week.

Sen. William Proxmire (D-Wis.) said the hearings were called because the Department of Housing and Urban Development made a deal with the NAR, long an opponent of some anti-discrimination enforcement methods, without consulting any other private organizations. He said fair housing groups were "outraged" that HUD had "not once negotiated" with them before reaching the agreement, which was then incorporated into anti-discrimination provisions of housing authorization bills sent to Congress.

Galen Martin, executive director of the Kentucky Commission on Human Rights, told the Senate housing and urban affairs subcommittee, "HUD has no business making deals with the Realtors. HUD ought to be on the side of law enforcement."

The NAACP has "grave reservations" about the agreement and the "undue influence of one group," Althea T.L. Simmons, director of the NAACP's Washington bureau, testified.

HUD Secretary Samuel R. Pierce Jr. decided to negotiate with the NAR because the organization's opposition to the original proposal for funding private testing was "a source of concern to us," HUD general counsel John Knapp told the subcommittee. Officials felt "the success of the program would be in some danger" if enacted over the opposition of the powerful organization, he said.

William D. North, executive vice president of the Realtors' association, said the agreement reached by his group and HUD "would solve many of the concerns and abuses" that have so often brought the real estate industry and fair housing groups "to loggerheads." He said discrimination cases are too easy to file and too difficult for real estate organizations and individual agents to fight. He accused housing organizations of filing lawsuits as a way to raise money for operating expenses.

"There is a very serious invasion of personal rights and privacy [in] testing where there is no underlying complaint," North said.

The legislation now awaiting consideration by the Senate contains all the changes resulting from the controversial agreement, but the House cut out several of the provisions before passing its housing bill last week.

HUD's agreement with the 700,000-member NAR altered key sections of a $3 million proposal to fund private fair housing groups that test communities to determine whether real estate sales organizations and landlords are discriminating.

Testing, which private organizations have used for several years, is the means for gathering information about whether housing market information is being denied to black or other minority home seekers. Testers are sent out when allegations of bias are received against specific landlords or real estate agents, and to communities where the fair housing organizations believe discrimination is practiced, although no complaints have been lodged. If the white testers are told they may rent or buy the same property, the testimony of the testers is used as evidence of discrimination.

Under the agreement with the NAR, testing could be conducted only where complaints are received, and more testers would be required than is now the practice. When bias complaints are made against sales organizations, the two testers with closely matching income and other characteristics except for race must find the individual agent who first talked with the home seekers who filed the complaints and again attempt to buy a house through that agent. In other changes to the original legislative proposal, restrictions would be placed on the methods of evaluating testers' evidence.

HUD's original proposal would have established guidelines more in line with rules most private fair housing organizations use, such as accepting the testimony of a white tester and the home seeker who filed the discrimination complaint as evidence of discrimination.

Requiring two sets of testers could signal that an investigation is underway and is "tantamount to banks having to be robbed twice by the same robbers" before a case can be taken to court, said Lee Porter, director of the Bergen County, N.J., Fair Housing Council.

Courts accept the testimony of a home seeker and one tester as sufficient evidence in many cases, according to attorney Avery Friedman, who specializes in fair housing law. None of the estimated 275 housing discrimination cases tried in federal courts since the 1968 Civil Rights Act was passed could have been taken to court under the testing guidelines now proposed, he said. None of the judges "required this kind of evidence to establish that a violation" of law had occured.

Although the restrictions agreed to by the administration and the NAR apply only to the testing funded under HUD's "private enforcement initiative," as the new program is to be known, civil rights groups fear they "may be misconstrued" as applying to evidence required in cases brought to trial under the 1968 civil rights law, Friedman said.

Limiting testing to cases of specific complaints "effectively guts fair housing testing," Martin said. Before the 1968 civil rights law was passed, discrimination was "open and advertised." Since then, "in Kentucky, we say we've gone to Northern-style discrimination * * *, polite, courteous and very devious." Testing of suspect landlords and sales people is essential if subtle bias is to be discovered, he said.

Knapp and North told the subcommittee they believe fears that courts will consider the guidelines as a standard for evidence in fair housing cases are unfounded.

information and by the Leadership Council itself, based on standing conferred by Coleman v. Havens Realty, 102 S.Ct.1114 (1982). The four cases were captioned, Leadership Council v. Regan, 83 C 8026, Leadership Council v. Century 21 Accent, 83 C 8023, Leadership Council v. Busch Brothers Realty, 83 C 8024, Leadership Council v. Red Carpet Contempo Realty, 83 C 8025. The companion Justice Department cases are U.S.A. v. Century 21 Accent, 84 C 3430; U.S.A. v. Red Carpet Contempo, 84 C 3432; U.S.A. v. Busch Bros. Realty, 84 C 3432; U.S.A. v. Regan Corp., Inc., 84 C 3434.

At the time of filing, the Leadership Council proposed a settlement based on recovery of the actual costs of conducting the series of tests, and on affirmative steps to ensure future compliance with fair housing laws. The proposal was made to the president of the Chicago Board of Realtors, who agreed to act as mediator. The proposed offer of settlement was not accepted.

Leadership Council v. Regan was tried in 1984, (before a jury from which all black persons had been excluded by peremptory challenges by the defense). The jury found for the defendants, but did not state the basis for their finding.

After this trial, the mediator initiated discussions between the Leadership Council and the other three defendants, which resulted in consent orders filed with the U. S. District Court in October and November of 1984. The consent orders provided that each defendant pay the Leadership Council $5,615.25 or a total of $16,845.75 and agree to certain affirmative relief.

The amount of $5,615.25 was a negotiated figure based on coverage of part of the costs of conducting the series of tests plus part of attorneys' fees.

One provision of the affirmative relief was that each defendant would use his or her best efforts to encourage the Southwest Suburban Board of Realtors to enter into an agreement with the Leadership Council to cooperate to achieve a fair and open housing market in southwest suburban Chicago. Those efforts were successful and such an agreement is now in effect.

Earlier, a similar cooperative agreement was proposed by the Leadership Council to the Illinois Association of Realtors (IAR) (Illinois affiliate of the National Association of Realtors). Detailed negotiations continued for several months. Those negotiations were terminated by IAR after receiving a letter from Mr. North, then General Counsel of the National Association of Realtors, advising them not to cooperate with the Leadership Council and threatening penalties if they did.

In addition, the Leadership Council has an arrangement to provide training for the Northwest Real Estate Board and the North Side Real Estate Board, and has conducted testing for an individual firm, Century 21 Rainbo.

In sharp contrast to Mr. North's frequent allegations that fair housing groups, and in this case the Leadership Council, seek to profit unfairly from testing, this record demonstrates that we use testing to solve the problem of housing discrimination and that such testing often leads to cooperative arrangements regarded as mutually beneficial by the Leadership Council and by real estate firms and boards.

The tests which led to these beneficial results in these cases would not have been permitted under the guidelines negotiated by NAR and HUD. These tests did not result from a specific allegation but from widespread knowledge that no blacks were resident in the area, and a suspicion that discrimination in real estate offices, widely practiced, was, at least, a part of the cause. The tests were not limited to particular agents but were tests of the practices of real estate offices, confirmed by multiple tests.

We continue to believe that systemic testing in particular sub-markets is necessary and appropriate, and that limiting testing to particular agents is, in most real estate markets, unfeasible, and serves to diminish the responsibility of the principal in charge of a firm for the conduct of his agents, as is well established in law.

For these and other reasons stated ably by our colleagues in fair housing and other civil rights agencies, we oppose the NAR/HUD guidelines while we strongly support the basic provisions of the Fair Housing Initiatives Program.